No. 05-665

In The
Supreme Court of the United States

ERIK MATELJAN, EMILY AFTANDILIANS, BENJAMIN FANALE, CAROL PAULICK, MATIN DAVARI,

Petitioners,

v.

PEOPLE OF THE STATE OF CALIFORNIA,

Respondent.

On Petition For Writ Of Certiorari To The California Court Of Appeal, Fourth Appellate District, Division One

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

Since 1999, Police officers and prosecutors in the City and County of San Diego, California, have allowed unlicensed, unqualified, unsupervised contract employees to draw the blood of DUI suspects. The blood was drawn in dirty booking rooms, and sometimes in the jail garage where multiple patrol cars emitted exhaust. They re-used **contaminated** medical supplies from suspect to suspect in violation of state and federal safety standards. For years, defendants were kept in the dark. Law enforcement, in conjunction with city and county prosecutors, withheld these facts from petitioners here and *thousands* of unknowing suspects that came before them.

The California Fourth District Court of Appeal, Division One, held there was a deliberate and systematic violation of law, but denied Petitioners' Fourth Amendment, Due Process and Equal Protection claims. The California Supreme Court denied review.

1. This Court should grant *certiorari* in light of the California Court's repudiation of this Court's holding in *Schmerber v. California,* 384 U.S. 737 (1966).

2. Law enforcement's wholesale disregard of local, state and federal health and safety protocols violated Petitioners' Fourth Amendment rights.

3. Law enforcement's intentional and wilful withholding of *Brady* discovery violated petitioners' rights to Equal Protection and Due Process.

4. The intentional, wilful, deliberate and systematic violation of the law by law enforcement and prosecutors warrants dismissal.

LIST OF PARTIES TO THE PROCEEDING

Erik Mateljan, Emily Aftandilians, Benjamin Fanale, Carol Paulick, Matin Davari, Petitioners

People of the State of California, Respondent

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The San Diego Superior Court, denied Petitioners Mateljan's and Aftandilians' consolidated motion to suppress and dismiss on January 21, 2003. *See,* Appendix B. It also denied Petitioners Fanale's, Davari's and Paulick's consolidated motion to suppress on March 19, 2003. *See,* Appendix C. Petitioners appealed. The Appellate Division of the San Diego Superior Court affirmed the trial courts' rulings without opinion.

The California Fourth District Court of Appeal, Division One, consolidated both sets of cases. It upheld the lowers courts' rulings, thus denying Petitioner's suppression motions based on Fourth Amendment, Due Process and Equal Protection claims. *People v. Mateljan*, 129 Cal.App.3d 367 (2005). *See,* Appendix A. Review was denied by the California Supreme Court. *People v. Mateljan*, 2005 Cal. LEXIS 9365 (Cal., Aug. 24, 2005). *See,* Appendix D.

JURISDICTION

This Court has jurisdiction under 28 U.S.C. § 1257(a).

CONSTITUTIONAL PROVISIONS INVOLVED

The Fourth Amendment to the United States Constitution provides:

> The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

The Fifth Amendment to the United States Constitution provides that no person shall be deprived of life, liberty or property without Due Process of Law.

The Sixth Amendment to the United States Constitution provides, in relevant part:

> In all criminal prosecutions, the accused shall . . . be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defence.

The Fourteenth Amendment to the United States Constitution makes the above amendments applicable to the states and guarantees Due Process and Equal Protection under law.

STATEMENT OF THE CASE

Law enforcement agencies in the City and County of San Diego contracted with American Forensic Nurses ("AFN")[1] in 1999 to provide licensed medical personnel to draw suspects' blood in DUI cases. Pursuant to health and safety regulations only certain individuals were allowed to draw blood for forensic alcohol testing. AFN employees who called themselves "phlebotomists" were excluded from that statute. [Former] Veh. Code § 23158, subd. (a).

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[1] AFN employed non-medical, unlicensed personnel to draw blood. The corporation, whose address is a Mail Boxes Etc. mail drop, is run out of the Palm Springs mansion of Faye Battiste-Otto. AFN has no storage facilities for medical supplies; employees follow no protocol for blood draws; employees are not supervised. Employees are not legally entitled to carry needles.

This case began in 2002 when 67 DUI suspects joined together in the San Diego Superior Court, Central Division, and another 22 DUI suspects joined together in the Northern Division, to challenge the illegal, unsanitary and dangerous manner in which their blood was drawn by law enforcement. Petitioners herein are the last remaining of that original group.

Petitioners were arrested for suspicion of DUI, in violation of Vehicle Code section 23152, subdivisions (a) and (b). Each was given a choice of a blood or breath test, and each submitted to a blood test. Petitioners' blood was drawn by AFN employees masquerading as qualified medical personnel, thus vitiating any consent.

AFN employees drew Petitioners' blood in filthy conditions at the heavily trafficked police station booking rooms or in the police station garage where waiting police cars emitted exhaust fumes. Officers falsely listed the technicians as "lab tech" or "nurse" on sworn reports. City and County prosecutors withheld evidence from Petitioners that the technicians re-used medical supplies in violation of OSHA and CalOSHA safety mandates, and stored their medical supplies in unsanitary places without disinfection procedures, quality control procedures or temperature controls.

San Diego city and county prosecutors charged Petitioners with DUI, but deliberately concealed the fact that the "lab technician," or "nurse" was really an unlicensed, unsupervised AFN employee. This information, and much more, was first acquired by the defense in 2002 through a California Public Records Act request (California Government Code sec. 6250, et seq.) where it was learned that law enforcement knew of these violations since at least 1999. *See,* Appendix E. Law enforcement was aware that

cases had already been compromised by use of these unqualified individuals. One 1999 e-mail included banter between crime lab analysts indicating that only "with it" defense attorneys had learned of their subterfuge. *See,* Appendix E5.

When this was uncovered, law enforcement banded together and lobbied the state legislature to change the statute. *See,* Appendix E6-8. City and County prosecutors then began giving immunity agreements to the AFN personnel, while continuing to allow them to operate illegally. *See,* Appendix F1-3. The legislature, without being informed of the dangerous "manner" in which these blood draws were conducted, amended the statute to allow blood draws by "state certified" phlebotomists.

Years later, AFN employees are still illegally drawing blood of DUI suspects with permission of the same prosecutors. *See,* Appendix G.

The Court of Appeal picked through the thousands of pages of briefings, documentary evidence and testimony, most of which was damning to the prosecution and its criminal agents. It relied on snippets to author it's result-oriented opinion suspending application of health and safety standards to DUI suspects and, thus, repudiating this Court's holding in *Schmerber*.

REASONS WHY *CERTIORARI* SHOULD BE GRANTED

The Court of Appeal's decision *directly conflicts*, and is *irreconcilable* with, this Court's holding in *Schmerber v. California*. California courts now authorize law enforcement officers and prosecutors to commit crimes against citizens to illegally obtain evidence and unlawfully use it against them without penalty. There is now a completely

standardless procedure in California where law enforcement is no longer required to comply with local, state and federal health and safety regulations in order to draw misdemeants' blood for DUI investigations. It sets a dangerous standard for this country.

ARGUMENT

I. SUPREME COURT REVIEW IS REQUIRED IN LIGHT OF THE CALIFORNIA COURT'S REPUDIATION OF THIS COURT'S HOLDING IN *SCHMERBER V. CALIFORNIA*

Nearly forty years ago, this Court announced in *Schmerber v. California* 384 U.S. 737 (1966) (*Schmerber*), that while the state may collect a drunk driving suspect's blood with, or without, his or her consent owing to the exigency of the circumstances, the collection of that blood must be conducted in a "medically approved manner" to satisfy the Fourth Amendment. This Court recognized that the taking of a blood sample for driving under the influence (DUI) constitutes a seizure within the meaning of the Fourth Amendment. *Schmerber*, at 767. Accordingly, the Supreme Court set limitations on the circumstances under which the police, acting without a warrant, could seize blood from an arrestee.

Specifically, this Court held that such a seizure could be lawful only if the officer ordering the blood sample reasonably believed he was confronted with an emergency, the officer had probable cause to believe the suspect had been driving under the influence, and the procedures used to extract the blood were *reasonable and medically approved.* One of the specific situations mentioned by the court as *not* being "reasonable" was a blood-draw conducted

by other than trained medical personnel at the "station house." *Schmerber*, at 770-772 [emphasis added].

Forty years after this Court's ruling in *Schmerber*, the California Courts have repudiated those protections, and made new rules of their own . . . California courts now *expressly authorize* the use of untrained, unsupervised, non-medical personnel drawing blood in filthy jails re-using medical supplies from person to person. This Court's Fourth Amendment protections enunciated in *Schmerber* have been repudiated by a lower court not competent to make that ruling.

A. THE CALIFORNIA COURTS NOW AUTHORIZE STANDARDLESS BLOOD DRAWS IN DUI CASES. PROSECUTOR AND LAW ENFORCEMENT OFFICERS MAY COMMIT CRIMES TO ILLEGALLY OBTAIN EVIDENCE TO BE USED AGAINST CALIFORNIA CITIZENS

California Business & Professions Code ("B&P") sec. 145 states that *unlicensed activity* is a *direct threat* to the *health and safety* of the People of the State of California.

The California legislature has declared it is a "**direct threat to the health and safety of the people of the state of California to engage in unlicensed activity.**" B&P sec. 1285 [emphasis added.]. B&P sec. 1282.2 states it is unlawful to perform venipuncture unless authorized by law. B&P sec. 1283.3 makes it unlawful for anyone to act with willful and wanton disregard for a person's safety that exposes him to a substantial risk of injury.

As will be shown, *ante*, the AFN employees complied with none of these health and safety codes, and their actions placed the suspects in danger of infection.

B&P sec. 1287 makes the above violations misdemeanors punishable by up to a year in the county jail and a $1,000 fine. That's why prosecutors granted *immunity* to AFN employees who testified in court. *See,* Appendix F. Prosecutors knew their agents had committed crimes at their direction and offered them immunity when their illegal activities were uncovered.

B&P sec. 2052 states it is a misdemeanor for anyone to masquerade as health care personnel when they hold no valid certificate to perform medical functions. B&P sec. 4140 prohibits anyone from carrying a needle except as authorized by law. B&P sec. 4141 prohibits anyone from furnishing needles without a license. Needles may not be sold to anyone except upon a prescription from a physician, dentist, veterinarian, or podiatrist. *See,* B&P sec. 4142.[2]

Those empowered to draw blood of people arrested for drunk driving are "licensed physician or surgeon, registered nurse, licensed vocational nurse, duly licensed clinical laboratory technologist or clinical laboratory bioanalyst, unlicensed laboratory personnel regulated pursuant to [specific codes], or certified paramedic. . . ." *See,* [Former] Vehicle Code sec. 23158(a).

Ergo, the doctrine of *expressio unius exclusio alterius est*, no one else is empowered to draw his blood for forensic alcohol analysis for drunk driving prosecutions. It is a criminal act, prosecutable under 18 U.S.C. sec. 241/242.

"It has been established by [a number of] cases that the right to penetrate the human tissue for injection of

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[2] This excludes even highly-educated health care providers, such as registered nurses.

drugs, medicines, or to draw blood, does not come from the expertise or training of the injector. ***The right to inject is based on the state's interest in protecting the public health.*** Competency is to be determined by the state, not by the injector's associates, and is evidenced by a license issued by the state. (*People v. Nunn*, 65 Cal.App.2d 188 [150 P.2d 476], conspiracy permitting chiropractors to practice medicine, including injection of medicines, [***81] without a license; *Magit v. Board of Medical Examiners*, 57 Cal.2d 74 [17 Cal.Rptr. 488, 366 P.2d 816], forbidding unlicensed person to administer anesthetics, including spinal injections, even though under supervision of a licensed physician; *Cooper v. State Board of Medical Examiners*, 35 Cal.2d 242 [217 P.2d 630, 18 A.L.R.2d 593], forbidding penetrating human tissues in giving blood transfusion by licensed drugless practitioners or licensed [*162] clinical technologist, even though under direction of licensed physician; *Newhouse v. Board of Osteopathic Examiners*, 159 Cal.App.2d 728 [324 P.2d 687], forbidding penetrating human tissue by licensed chiropractors by use of suture needle, even though under direction of licensed physician.)") *People v. Rehman*, 253 Cal.App.2d 119, 161 (1967.)

In *Rehman*, a hospital administrator employed a series of unlicensed practitioners to practice in his hospital. Rehman and the staff were, *inter alia*, convicted of California Penal Code sec. 182, which makes it a felony if two or more persons conspire to commit any crime or commit any act injurious to the public health.

"The term 'any act injurious to the public health' was a well defined phrase at common law and specifically was directed toward (1) quarantine violations, and (2) unnecessary operations and unlicensed practice of medicine which has for their motives avarice and greedy expectation of

financial gain or other sinister purpose." *Rehman*, at 153-154.

The highest law enforcement office in California, the Attorney General, has discussed the *absolute necessity* of licensing in the medical professions in a series of official opinions. *56 Op. Atty Gen. Cal. 65*; *56 Op. Atty Gen. Cal. 523*; *59 Op. Atty Gen. Cal. 112*. *See,* Appendices I, J, K.

Licencing is *required* to draw blood and to inject, whether or not Vehicle Code sec. 23158 applies to a case or not. Drawing blood, or even just carrying a needle without permission from the state, is a crime.

Here, City and County law enforcement, with their agent AFN, conspired to provide inadequate services of unlicensed personnel because it was cheap. *Mateljan, supra*, at 371.

It is well held that where a search involves a surgical intrusion beneath the skin, its reasonableness depends in part on "the extent to which the procedure may threaten the safety or health of the individual." *Winston v. Lee*, 470 U.S. 753, 761-762 (1985).

Some 29 years after *Schmerber* was decided, the federal courts still struggled with the meaning of what was "medically acceptable." To address the issue of taking blood samples in a "reasonable manner" it was stated in *United States v. Chapel*, 55 F.3d 1416 (9th Cir. 1999), "We have defined 'reasonable' in the context of blood draws to mean that 'the sample must be taken by *trained medical personnel* in accordance with accepted practices.'"

Expanding on the never-ending advances in medicine and never-ending identification of infectious diseases, the court in *Nelson v. City of Irvine*, 143 F.3d 1196 (9th Cir. 1998), likewise acknowledged the risks: "[M]edical science

now teaches us that special precautions should be employed in procedures involving exposure to bodily fluids." *Id.* at 1201.[3] [emphasis added].

In 1966 the State of California responded to *Schmerber* by enacting Vehicle Code section 23158(a). It established a baseline, *minimum standard* in our community, authorizing only certain licensed, state qualified individuals to perform this medical procedure. Simultaneously, the legislature also enacted then Vehicle Code sec. 13343 (subsequently renumbered section 23612). Hemophiliacs and individuals taking anti-coagulants are exempt from taking blood tests. Today, sections 23612(5)(B) and (C) maintain those safety measures.

The purpose of this statutory scheme was to promote the confidence of the public in the system of collecting blood samples for alcohol testing and to insure against injury to persons by use of unqualified personnel. *Wheeler v. DMV*, 34 Cal.App.4th 228 (1994).

As will be shown, *ante*, the unlicensed AFN employees never took any type of medical history.

There is no dispute that the state has a legitimate interest in the enforcement of the DUI statutes. The question, then, is this: May law enforcement and prosecutors commit crimes, endanger citizens and withhold evidence in order to secure convictions?

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[3] The court cited Centers for Disease Control, U.S. Department of Health and Human Services, Guidelines for Prevention of Transmission of Human Immunodeficiency and Hepatitis B Virus to Health-Care and Public Safety Workers, 17-18 (1989) ("Blood from **all** individuals should be considered infective," and the "use of needles and syringes should be limited to situations where there is no alternative").

Petitioners contend the answer must be a resounding, "No."

B. THE COURT OF APPEAL IMPERMISSIBLY SHIFTED THE BURDEN OF PROOF TO PETITIONERS, SETTING A DANGEROUS STANDARD IN CALIFORNIA

The prosecution bears the burden of establishing the legality of a warrantless search. Warrantless searches are per se unreasonable. *Schmerber, supra*, 384 U.S. at 771-772; *Coolige v. New Hampshire*, 403 U.S. 443, 454-455 (1971); *Welsh v. Wisconsin*, 566 U.S. 740, 749-750 (1984).

In the first case of a series of like appeals, the same court of appeal who denied these petitioners' claims, held that it was *unnecessary* for prosecutors to present expert medical testimony as to whether the blood draw conducted in that case was "medically accepted" in the scientific community. *People v. Esayian*, 112 Cal.App.4th. 1031 (2003). The Court determined that it was capable of making that medical judgment. *Id.*, at 1039-1040.

This impermissibly shifts the burden of proof. The author of that opinion, Justice Huffman, is one of the very justices here who also rejected these Petitioners' claims.

Justice McIntyre dissented. He pointed out that the technician was *statutorily unqualified*, and was *completely ignorant of* the mandates of California Code of Regulations Title XVII which sets out minimum standards for drawing blood for forensic purposes. He also pointed out that the blood draw in that case, conducted in a non-medical facility, "adds to the risk, and thus the magnitude of the intrusion, absent a showing that the safety and sanitation standards maintained at the detention facility are similar

to those that are required in medical facilities." *Esayian, supra*, at 1045.

In this case, there was equally no showing of any protocol whatsoever, much less any that rivaled a medical facility.

In essence, the court here set a new standard that requires defendants to prove the manner in which their blood draws were conducted was not **deadly**, instead of requiring the prosecutors to prove the bodily invasions were reasonable. It is a standard this Constitution does not support.

C. THE COURT OF APPEAL DISCARDED EVIDENCE THAT CLEARLY SHOWED PETITIONERS WERE PLACED IN DANGER OF INFECTION AND THE BLOOD DRAWS PERFORMED WERE UNREASONABLE

As seen, in Section I.A, *supra*, there is a host of health and safety code violations enacted in California. The above are just a small sampling of those statutes the AFN employees violated here. But the Court of Appeal completely disregarded the wholesale violations of all of these and, instead, set up a new and different rule that suspends application of these safety regulations in DUI cases.

In her summary of the facts, Justice Benke said, "all of the phlebotomists used by AFN had received post-secondary training as medical assistants, including instruction in phlebotomy." *People v. Mateljan, supra*, at 372.

In fact, the record amply showed that most of AFN's phlebotomists had far less than the educational training required to meet state standards. For example, AFN

employee Stacy Walker took a two-month phlebotomy class and her "certificate"[4] stated that she had only ten hours of phlebotomy training in 1998. **In September 2002, she was no longer allowed to draw blood owing to her lack of credentials.** Prior to her termination from AFN, she had completed 50-60 legally unauthorized blood draws per month. AFN employee Michelle Lee went to Kelsey-Jenny Business College in 1994, then took a "refresher course" at Boston Reed Company for 16 hours several years later. She only had to do *three sticks* to pass. She was later given immunity from both City and County prosecutors. *See,* Appendix F1-2; H10.

Additionally, Kim Dominguez, a *supervising* phlebotomist at AFN, testified that **AFN has *no rules, procedures,* or *protocols* regarding the storage of supplies given out to phlebotomists**. *See,* Appendix H12.

AFN phlebotomists stored their kits in unsanitary conditions at their homes, seldom cleaned their supplies, and stored their supplies in dusty garages, under kitchen sinks with the household cleansers, in closets, and in trunks of cars with no temperature controls. *See,* Appendix H12.

Prosecution witness Alice Cresci herself used re-used contaminated vacutaner tube holders at Pomerado Hospital in violation of OSHA and CalOSHA requirements up until the week before her testimony. She had *no knowledge* of the OSHA requirements for blood draws and

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[4] None of the phlebotomists held a certificate issued by any state organization. The prosecutors consistently called these blood drawers "certified phlebotomists" when, in fact, their certificates came from technical schools most of which have no accreditation.

the protocol as to the use of vacutaner tube holders. *See*, Appendix H11.

Cresci's supervisor, Ted Drescher, is the phlebotomy manager at Pomerado Hospital. He testified, *inter alia*, that state health regulations require that one must throw away anything that touches the patient, including the vacutaner tube holder, and that this is a hospital-wide policy which is strictly adhered to at Pomerado Hospital.[5] *See*, Appendix H11.

Prosecution witness Dr. Robin said it is a necessity at his hospital that a medical history be taken before a blood draw in any case other than an emergency. Yet he found no problem with the AFN employees complete failure to do so, even though the health and safety codes require preliminary screening of DUI suspects before their blood is taken. B&P sec. 23612(5)(B) and (C). *See*, Appendix H14-16.

He said "in phlebotomy we take all precautions necessary to prevent infections."

He was forced, on cross-examination to admit:

> 1) If protocol for a procedure is in force, it is not medically-approved not to use it; 2) He follows specific protocol at the hospital for protection of patients and staff; **3) Protocols "ascertain the minimum requirements** of procedures and policies as affects – as affect the patients and hospital employees"; **4) If one falls below the basic, minimum standards, the hospital could be shut down**; 5) It is not medically accepted in the medical community to have protocol and not disseminate it to employees. One must at least follow minimum requirements set out by regulatory

[5] This, of course, calls into question Ms. Cresci's entire testimony.

agencies; 6) **If the minimum requirements outlined by regulatory agencies are not followed, there could be danger to the patient**; 7) Hand washing is the single most important procedure for preventing infection; 8) The phlebotomists at *his* hospital are "thoroughly and rigorously trained on didactic and written materials" and "we observe them and we track them and follow them carefully." *See*, Appendix H14-16.

Dr. Robin, like Cresci, was ignorant of OSHA and CalOSHA regulations precluding the reuse of vacutaner tube holders.[6] *See*, Appendix H16.

Finally, the trial court declined to allow the doctor to answer the following question which counsel proffered won the issue of *Winston v. Lee, supra*: "If two procedures could give the same result, one of which is harmless, and one of which might present some harm, wouldn't one choose the procedure that had no possible contraindications?" The defense position was that there was a perfectly safe breath test to be had in lieu of subjecting suspects to such dangerous blood draws. Such breath tests have been held to be the "functional equivalent" of a blood test. *People v. Fiscalini*, 228 Cal.App.3d 1639 (1991). The trial court answered, instead. "The answer is obvious. One always chooses the lesser of two evils." *See*, Appendix H17. In each case there was a non-invasive breath test available.

Dr. Leland Rickman, while attempting to support the prosecution's insistence that AFN phlebotomists posed no heath risk to those whose blood they drew, had to admit under cross-examination that: 1) Storing vacutaner tubes at low or high temperatures could destroy the integrity of

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[6] Calling into question, of course, the value of his testimony.

the powder and affect the results of the tests; **2) There is a risk of transmission of pathogens to a patient by reuse of blood tube holders**; 3) In non-emergency situations, it is not proper to have violations of protocol; **4) Any time there is an invasive procedure such as breaking skin for a blood draw, there is a risk of infection**; and, 5) One of the main considerations for using reasonable medical techniques is to obtain a valid sample. *See,* Appendix H13.

Les Revier, the chief of quality assurance at University of California at San Diego clinical laboratories, a California Department of Health Services licensed and accredited laboratory, said AFN employees failed to follow almost all of the medically-approved standards set forth in OSHA, CalOSHA, and Department of Health Services regulations.

In cases of emergency, such as a bio-terrorist incident, rules and procedures may be suspended. But Revier stated, **"I can't imagine having a phlebotomy station in a garage."** OSHA standards protect the patient. It used to be that vacutaner tube holders were taken apart and re-used. **That would be "unheard of" today**. *See,* Appendix H13-14.

Revier discussed the outbreak of more than 1,000 cases of aggressive and painful skin bacteria resistant to antibiotics appearing in San Francisco and Los Angeles County jails. *See,* Appendix H14.

The evidence showed unequivocally that the complete and utter disregard for all health and safety procedures posed a serious risk to these California citizens, a risk that would never be sanctioned if it occurred in a doctor's office, clinic, hospital, nursing home – a veterinary clinic.

This Court cannot subscribe to such a dangerous position.

D. THERE CAN BE NO JUDGMENT OTHER THAN THAT PETITIONERS' FOURTH AMENDMENT RIGHTS WERE VIOLATED

It has been long held that where a search involves a surgical intrusion beneath the skin, its reasonableness depends in part on "the extent to which the procedure may threaten the safety or health of the individual." *Winston, supra*, at 761-762).

In San Diego, California, there are no protocols, inspection, oversight, or supervision of AFN's non-medical personnel. That directly implicates the safety and health of San Diego citizens. There was practically **no evidence** that could possibly lead a reasonable person to believe that AFN employees drew blood for chemical testing in a medically-approved manner.

Justice McIntyre sat on the appellate panel in the *Esayian* case. He saw the writing on the wall and disagreed with the majority.[7] He believed suppression based on such misconduct was appropriate. He was precluded from sitting on this case. This was his opinion of the law and how it should be applied to the malfeasance of the government:

> The United States Supreme Court has stated that the exclusionary rule is a judicially created remedy designed to deter law enforcement misconduct by prohibiting the admission of evidence

[7] The omission of this justice from the panel was discussed at length in a Petitioners' counsel's Motion to Recuse Justice Huffman, which we have not included in these appendices.

> obtained in violation of the Fourth Amendment. (*Arizona v. Evans* (1995) 514 U.S. 1, 10 [131 L. Ed. 2d 34, 115 S. Ct. 1185].) The purpose of the rule is not to cure the constitutional violation, which is already fully accomplished by the illegal search itself, but instead to effectuate the Fourth Amendment's guarantee against unreasonable searches or seizures by deterring future unlawful police conduct. (*Ibid.*) Based on this purpose, the application of the rule is restricted to situations in which the rule's remedial purpose is "effectively advanced," which in turn depends on "the source of the error or misconduct that led to the unconstitutional search and whether, in light of that source, the deterrent effect of exclusion is sufficient to warrant that sanction." (*People v. Willis* (2002) 28 Cal.4th 22, 29-30 [120 Cal. Rptr. 2d 105, 46 P.3d 898]) (*People v. Esayian* (2003) 112 Cal.App.4th 1031, 1047 (dissenting opn. McIntyre)).

Nonetheless, the new appellate court panel, absent the voice of Justice McIntyre, upheld the trial court's denial. Petitioners here were entitled to the suppression of evidence illegally seized in their criminal cases, and this Court should act to correct its decision, since it was not founded in "substantial evidence."

What now exists is a double standard where nice, law-abiding citizens are entitled to the regulatory protections enacted for the safety of patients, while those health and safety regulations are suspended for DUI suspects. Their reasoning?

It was cheap.

But it is also hazardous. This court must protect the citizens of San Diego.

E. VEHICLE CODE SECTION 23158(A) IS CO-EXTENSIVE WITH THE FOURTH AMENDMENT

The heavy briefings from the trial, and exhibits submitted therein, prove that Vehicle Code section 23158(a) is not "just some statute" as the prosecutors like to call it, which precludes suppression under California's Proposition 8.

It is a statute enacted *as part of* the "implied consent" law and *in direct response to* this Court's holding in *Schmerber*. As such, California Proposition 8 requires suppression based on violations of this state statute and other health and safety statutes, since it's enactment was based on complying with the Fourth Amendment principles set out in *Schmerber*. *People v. Ewoldt*, 7 Cal.4th 380, 391-392 (1994). *See,* Appendix H21.[8]

Of note should be the Court of Appeals' consistent and improper reliance on *People v. McKay*, 27 Cal.4th 601, 607-619) (2002), for the proposition that the violation of Vehicle Code section 23158(a) does not warrant suppression. *Mateljan*, *supra*, at p. 374.

But sec. 23158(a), and each of the statutes in Sec. I.A, *supra*, implicates the Fourth Amendment.

In support of this, the legislature has declared it is a **"direct threat to the health and safety of the people of the state of California to engage in unlicensed activity**." B&P sec. 1285. Vehicle Code sec. 23158(a) is co-extensive with the Fourth Amendment because it

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[8] This issue was heavily briefed in multiple briefs below. Massive exhibits were included, such as full legislative history, senate bills, senate and legislative votes, amongst other exhibits too lengthy to include in these appendices.

specifically identifies which educated health care professionals may inject a suspect's vein with a needle.

Other states agree that purpose of strict compliance with statutory licensing provisions is the protection of the suspect and has Fourth Amendment implications.

In Texas, the legislature enacted a statute identifying who is qualified to draw the blood of DUI suspects. Texas has a law similar to California's Proposition 8, which precludes suppression based on state statutes unless that statute has Fourth Amendment implications. In suppressing a blood draw done by a paramedic, Texas's highest court identified the Fourth Amendment concerns built into the statute. *Texas v. Laird*, 38 S.W.3d 707, 714-715 (Tex.App.-Austin 2000).

Similarly, North Dakota protects DUI suspects from blood draws conducted by "self styled" phlebotomists without any medical education or supervision. *North Dakota v. Barnick*, 477 N.W.2d 200, 201-202 (N.D. 1991).

Clearly, in *Esayian* and *People v. McHugh* (2004) 119 Cal.App.4th 202, the Court of Appeal did not have before it the immense record of the breadth of prosecutorial misconduct it has here. Nonetheless, in response to these decisions, and the lobbying efforts of San Diego prosecutors, the legislature has now amended Vehicle Code section 23158 to allow "certified phlebotomists" to draw DUI suspects' blood without any supervision whatsoever. The Court of Appeal, in part, hung its hat on this change in law when denying appellants' motion.

Prosecutors lobbied the legislature to change the law to allow unsupervised phlebotomists to draw blood. We suspect they were no more forthright with the legislature about the filthy conditions and practices used in drawing blood than they were with defense attorneys.

The wound still festers beneath the band-aid because AFN to this day is still violating the law. In May 2003, the Department of Health Services issued a statewide cease and desist order against AFN based on defense counsel's investigation. The Department of Health Services has, since the new law went into effect, opened new investigations into AFN's continuing violations of the law. *See,* Appendix G.

This Court should therefore grant review to address the obvious constitutional violations present here. If not, *Schmerber* is dead in this land.

II. THE DUE PROCESS AND EQUAL PROTECTION RIGHTS OF APPELLANTS HEREIN, AND THOUSANDS BEFORE THEM, WERE VIOLATED WHEN PUBLIC PROSECUTORS AND OFFICIALS WITHHELD EVIDENCE FROM DEFENSE ATTORNEYS

Here, the appellate court improperly opined that equal protection must be applied only to "a claim of discriminatory enforcement," citing *Baluyut v. Superior Court* (1996) 12 Cal.4th 826. *Mateljan, supra,* at 376. But "discriminatory prosecution" is not necessary to a claim for a violation of an individual's right to equal protection of the law. No "suspect" class is necessary where a **substantive right** has been violated. The violation of a **substantive right,** *e.g.*, the right to be free from unreasonable search and seizure, constitutes a violation of the right to equal protection of the law under a strict scrutiny standard. *Nordinger v. Hahn*, 505 U.S. 1, 10 (1992).

California has followed the two-tier approach employed by this Court in reviewing legislative classifications under the Equal Protection clause. *Rittenband v. Cory*, 159

Cal.App.3d 410, 417-418 (1984). Under that approach, a strict scrutiny test is applied in cases involving suspect classifications or fundamental interests; the rational basis test applies in all other cases. *Ibid.* A fundamental interest for strict scrutiny purposes means a fundamental constitutional right. *See,* 8 Witkin, Summary of Cal. Law (9th ed. 1988) Constitutional Law, section 602, pp. 55-56.

In the present case, of course, that constitutional right is the right to be free from "unreasonable search and seizure."

If a regulation affects a certain group of people and a **substantial right** is implicated, the *burden is on the government to show the law is necessary to achieve a compelling government purpose.* The concept of personal privacy is implicit in the concept of "liberty" within the protection of the Due Process Clause; *i.e.*, it is one of those most basic human rights which are of "fundamental" importance in our society. *Roe v. Wade*, 410 U.S. 113 (1973).

Making money, keeping money, or saving money for a private company is not a "compelling state interest." That, according to Faye Battiste-Otto, owner of AFN, is the reason why she did not supply nurses, and the reason why prosecutors hid their malfeasance all these years. *Mateljan, supra*, at 371. Nor is the need for speed a valid basis for violating Equal Protection. *Bush v. Gore*, 531 U.S. 98 (2000).

The violations of Due Process are just as easy to grasp. Prosecutors never told these, or any other defense attorneys, that the people they were passing off as "nurses" were storing their phlebotomy supplies and chemical tubes in steamy car trunks in the summer heat,

thereby destroying the integrity of any medical equipment that might subsequently be placed in them.

Dr. Rickman, Dr. Robin and Les Revier **all agreed**: *storing blood tubes in extreme conditions can destroy the integrity of the sample*. They all agreed. These AFN employees stored their supplies in laundry rooms, garages and car trunks, thus destroying the integrity of any samples that may later have been placed in them.

And the prosecutors knew. Hundreds, if not thousands of defendants, who were arrested since 1999 and before the instant case, were precluded from cross examining witnesses to attack the integrity of the sample.

We wonder what else is out there that is hidden in the bowels of the crime labs and prosecutors offices in San Diego? Whatever scurrilous conduct was uncovered by the defense, it was done through means independent of the criminal discovery scheme. What have they hidden that we don't know about? We will never know, and prosecutors continue to get a "pass" notwithstanding the outrageous behavior they have engaged in thus far across the board for more than half a decade.

III. THE DELIBERATE AND PERSISTENT VIOLATION OF STATE LAW WARRANTS THE SANCTION OF DISMISSAL

Some twelve years ago, Justice Richard Huffman, who sat on petitioners' panel here, was faced with allegations of serious prosecutorial misconduct less egregious than the violations found in this case. He authored an opinion in *People v. Garcia,* 17 Cal.App.4th 1169, 1179 (1993) highlighting the point that the California Supreme Court imposes a strict duty upon prosecutors by requiring them

to disclose substantial material evidence favorable to the accused without request, and even after trial.

"Material evidence in this context is evidence 'which tends to influence the trier of fact because of its logical connection with the issue [citations].'" *People v. Morris*, 46 Cal.3d 1, 30, fn. 14 (1988). The duty to disclose evidence favorable to the accused extends to evidence which may reflect on the credibility of a material witness. *People v. Rutherford*, 14 Cal.3d 399, 406 (1976); *see*, also *Giglio v. United States*, 405 U.S. 150, 153 (1972).

Justice Huffman went on to say at pages 1179, 1180:

> " . . .we allowed a referee's hearing to go forward the following month because allegations of *gross and intentional misconduct* with respect to the *nondisclosures* have surrounded this case. Because of the nature of those allegations – which if substantiated **could justify outright dismissal** (*see*, e.g., *Barber v. Municipal Court* (1979) 24 Cal.3d 742 [157 Cal.Rptr. 658, 598 P.2d 818]) – and the continuing public interest the case had generated, we believed it fitting to have a factual record established."

As shown below in the transcribed dialogue between Justice Huffman and prosecutor Tanney in the *Mateljan* case, prosecutor Tanney stayed glued to her position that she had no duty to divulge this clearly favorable evidence to the defense even when hotly challenged. Justice Huffman called her position on withholding the evidence "utterly unsound." He acknowledged the clear Due Process violations intentionally and willfully violated by the prosecutors. This included dialogue between Justice Haller and the city attorney prosecutor, Monica Tiana, as well.

This *Mateljan* Court indeed recognized there was a systematic and persistent policy by the city and county to

violate the statutory scheme for drawing blood in DUI cases. *Mateljan*, *supra*, at p. 376.

In *In re Garringer* (1987) 188 Cal.App.3d 1149, the court held that a systematic, persistent and deliberate policy of the non-advisement by police officers in compliance with the "Implied Consent" law, would give rise to a claim for violation of Due Process and Equal Protection. *People v. Brophy*, 5 Cal.App.4th 932 (1992).

Here is a portion of the dialogue prosecutor had in this case with the Court of Appeal:

J. HALLER	Speaking theoretically, would a prosecutor be required to advise defense counsel that blood was taken by someone who was not authorized by statute? Is that exculpatory?
DCA TIANA	**I would say no.**
J. HALLER	And why is that?
DCA TIANA	Because it does not violate any constitutional right and, uh, the blood draws were performed in (inaudible) . . .
J. HALLER	(Interjecting) Is it material exculpatory information under *Brady* the fact that someone not authorized . . .
DCA TIANA	I don't believe it would allow her to win a suppression motion, and it certainly . . .
J. HUFFMAN	Would it be evidence relevant to the credibility of the taker of the test and the gatherer of the results? Is it not – is there no tendency in reason to believe that a person who does not – is not "qualified" under state statute to do a job might be viewed by trier of fact less credibly than a person who was "qualified?"

DCA TIANA	Well, I think that based on the evidence that did come out in the suppression motion, I think that we show that they were qualified and skilled . . .
J. HALLER	Actually you know we're passing in the night here. Let's get – the question really relates to this: Does a prosecutor who knows that the person taking the blood draw is not authorized to do so, is that information, that is, exculpatory that needs to be turned over, so that when we're in trial, the defense attorney has a chance to say to the jury, "Oh, by the way, folks, this person isn't authorized," and then to cross-examine that person on what their particular procedure was on that evening?
DCA TIANA	**Yes**.

The Court chastised Deputy District Attorney Laura Tanney even more harshly.

DDA TANNEY	**It's our position that this is not *Brady* information**. Counsel or appellant cannot come up with a theory for something may be exculpatory without any precedent for it and then attempt to argue that that has exculpatory value, when there's absolutely no evidence there is any exculpatory value . . .
J. HUFFMAN	Well, about that issue, if you had a scientist, lab technician, a doctor testifying for the prosecution and it came to light that that person was not authorized by statute authorized to do what he or she was doing, is that not a fact that would bear on the person's credibility?

DDA TANNEY	There is no indication in this case that it has beared on the credibility.
J. HUFFMAN	I did not ask you if it has, I asked you, could it bear on the person's credibility? You mean, a jury might not be influenced knowing that a person's qualifications do not meet those of the statute – that they might not draw an adverse inference to the government's case?
DDA TANNEY	I suppose theoretically it could, but without any concrete evidence, that, such is the case . . .
J. HUFFMAN	**For crying out loud! The county has been running an unauthorized blood draw system for years!**
DDA TANNEY	I agree, and as . . .
J. HUFFMAN	And a jury would not be entitled to know that the person drawing the blood was doing so contrary to state law addressing this specific issue? You're saying to me that's irrelevant and it has nothing to do with the credibility of the government's case?
DDA TANNEY	I'm saying that there's been absolutely no demonstration it has any effect on the admissibility of evidence.
J. HUFFMAN	Well because it wasn't turned over and the juries did not hear it!
DDA TANNEY	But until this court makes a determination there's no precedent for the fact that it has any consequence whatsoever in this particular case since there's absolutely no evidence that the people were not unqualified as opposed to unauthorized.

J. HUFFMAN	Let me just suggest that speaking for myself, it's fortunate that you don't have the *Brady* issue squarely before us because I think, with all due respect, that argument is utterly unsound on the issue of *Brady* and its purpose as an exculpatory principle. That it – that hasn't happen to be before us – we've wondered into it – trying to clarify the issues, but so perhaps we'd be better served to focus on the issues in this case.

What sanction is there to prosecutors and their offices that would so strongly argue positions contrary to law in the face of challenge by appellate justices? The violations continue.[9] Why? Because there has thus far been no sanction.

Misconduct? Of course. Intentional and wilful? One must only read the above dialogue to obtain an affirmative answer.

"The prosecutor's job isn't just to win, but to win fairly, staying well within the rules." *United States v. Kojayan*, 8 F.3d 1315,1323 (9th Cir. 1993). "As an officer of the court, the prosecutor has a heavy responsibility both to the court and to the defendant to conduct a fair trial . . . " *United States v. Escalante*, 637 F.2d 1197, 1203 (9th Cir. 1980).

It is the height of hypocrisy to break the rules while prosecuting a person for allegedly breaking other rules of society. "Crime is contagious. If the government becomes a law-breaker, it breeds contempt for the law; it invites every man to become a law unto himself; it

[9] *See*, Appendix G.

breeds anarchy." *Olmstead v. United States*, 277 U.S. 438, 485 (1928) [Brandeis, J. dissenting].

CONCLUSION

For years City and County of San Diego prosecutors intentionally and wilfully sandbagged defense attorneys and put the public at risk. They did this because it was cheap. Every federal, state and local health and safety regulation and policy raised at the evidentiary hearings was breached by the prosecutors' agents.

The trial courts below condoned these actions. The Court of Appeal in hearing evidence regarding the massive violations of the standards of safety in the community for medical procedures, essentially created a double standard in the application of these rules: The minimum medically-accepted practices in the community apply to all those in clinics, hospitals, nursing homes, veterinary clinics, and other medical establishments. But regarding DUI suspects, the only standard that counts is the cheap and dangerous one. The California Supreme Court denied review.

As Justice Brandeis noted over three-score years ago,

> "In a government of laws, existence of the government will be imperiled if it fails to observe the law scrupulously. Our Government is the potent, the omnipresent teacher. For good or for ill, it teaches the whole people by its example. Crime is contagious. If the Government becomes a lawbreaker, it breeds contempt for law; it invites every man to become a law unto himself; it invites anarchy. To declare that in the administration of the criminal law the end justifies the means – to declare that the Government may commit crimes in order to secure the conviction of a private criminal – would bring terrible retribution.

> Against that pernicious doctrine this Court should resolutely set its face."

Elkins v. United States, 364 U.S. 206, 223 (1960), quoting approvingly *Olmstead v. United States,* 277 U.S. 438, 485 (1928) [Brandeis, J. dissenting]. As should this Court.

If not *Schmerber* is dead in this country.

Dated: November 18, 2005

Respectfully submitted,

OLIVER PATRICK CLEARY
MARY FRANCES PRÉVOST
Attorney for Petitioners

APPENDIX A

THE PEOPLE, Plaintiff and Respondent, v. ERIK HANS MATELJAN, Defendant and Appellant. [And five other cases.*]

**People v. Short, Jr.*, D044283 (Super. Ct. No. M875427); *People v. Davari*, D044516 (Super. Ct. No. CN148819); *People v. Yui*, D044517 (Super. Ct. No. CN148673); *People v. Fanale*, D044519 (Super. Ct. No. CN145324); and *People v. Paulick*, D044520 (Super. Ct. No. CN149604).

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COURT OF APPEAL OF CALIFORNIA, FOURTH APPELLATE DISTRICT, DIVISION ONE

129 Cal. App. 4th 367; 28 Cal. Rptr. 3d 506; 2005 Cal. App. LEXIS 760; 2005 Cal. Daily Op. Service 4049; 2005 Daily Journal DAR 5524

May 12, 2005, Filed

COUNSEL: Gary Nichols, County Public Defender, for Defendant and Appellant Willie Augusta Short, Jr.

Mary Frances Prevost for Defendants and Appellants Erik Hans Mateljan, Matin Davari, Brian Yui, Benjamin Fanale and Carol L. Paulick.

Casey Guinn, City Attorney, Susan M. Heath, Assistant City Attorney, Monica A. Tiana and Stephen Hanson, Deputy City Attorneys; Bonnie M. Dumanis, District Attorney; Kim-Thoa Hoang, Chief Deputy District Attorney, Anthony Lovett, Assistant Chief Deputy District Attorney, and Laura E. Tanney, Deputy District Attorney, for Plaintiff and Respondent.

JUDGES: Benke, Acting P.J., with Huffman and Haller, JJ., concurring.

OPINION BY: Benke

OPINION:

BENKE, Acting P. J. – Since February 11, 2004, Vehicle Code[1] section 23158 has permitted certified phlebotomists to draw blood without direct supervision from a physician or registered nurse from persons suspected of driving under the influence of alcohol. However, each of the appellants in this case was suspected of driving under the influence and taken into custody before February 11, 2004. Each appellant elected to have a blood test rather than a breath test. In each case, although the practice had not yet been authorized by the Legislature, a phlebotomist acting without direct supervision from a physician, registered nurse, licensed clinical laboratory scientist or analyst drew the suspect's blood. According to an expert offered by the People, the draws were accomplished in a manner which did not create any medical risk for the suspects.

By way of motions to suppress, each appellant argued that the absence of statutory authority to use phlebotomists should prevent the prosecution from relying on the blood which had been drawn from them. The trial court denied their motions, the appellate division affirmed the trial court's ruling and granted the appellants' application for certification to this court. We transferred the appeals and consolidated them.

We affirm the trial court's orders. In two prior cases, *People v. Esayian* (2003) 112 Cal.App.4th 1031 [5 Cal.

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[1] All further statutory references are to the Vehicle Code unless otherwise indicated.

Rptr. 3d 542] (*Esayian*) and *People v. McHugh* (2004) 119 Cal.App.4th 202 [14 Cal. Rptr. 3d 142] (*McHugh*), we rejected somewhat similar attacks on blood evidence drawn by phlebotomists and used in convicting defendants of driving under the influence. Here, in addition to the Fourth Amendment and due process arguments raised in *Esayian* and *McHugh*, the defendants argue use of phlebotomists deprived them of equal protection of the law. We reject this argument as well. The use of phlebotomists did not discriminate against the defendants on any invidious basis. Hence use of phlebotomists did not deny the defendants equal protection of the law.

SUMMARY

A. *City of San Diego*

Nineteen of the appellants were arrested in the City of San Diego[2] on suspicion of drunk driving and chose to provide law enforcement officers with blood samples rather than perform a breath test. All of their arrests occurred before February 11, 2004, and all of their blood samples were drawn by phlebotomists employed by American Forensic Nurses (AFN), a corporation which had contracted with a number of San Diego law enforcement agencies to take blood tests of drunk driving suspects.

In moving to suppress their blood tests, the appellants joined 48 other drunk driving suspects whose blood had been drawn by AFN phlebotomists before February 11, 2004. They argued that in using phlebotomists, the City of

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[2] The arrests were either in the City of San Diego or in areas of the County of San Diego where by agreement the city attorney is responsible for prosecuting misdemeanors.

San Diego violated their Fourth Amendment right to be free of unreasonable searches and seizures, their right to due process of law and their right to equal protection of the laws.

The trial court conducted a fairly extensive evidentiary hearing on the appellants' motion. The parties stipulated that each of the appellants was stopped by a law enforcement officer after the officer observed behavior which led the officer to suspect the appellant had been driving under the influence of alcohol. They further stipulated that the appellants consented to the blood tests and that the blood draws were done at the request of law enforcement officers. At the hearing the prosecution offered the testimony of the principal owner of AFN, Faye Battiste-Otto. Otto stated that in 1999 she began having difficulty providing personnel qualified under section 23158 to draw blood and met her contractual obligations to San Diego area law enforcement agencies with phlebotomists. According to Otto, she could not on an economic basis provide personnel who met the requirements of section 23158. With the knowledge of the supervising criminalist of the San Diego Police Department and other city officials, AFN used phlebotomists until November 2003.

All of the phlebotomists used by AFN had received post-secondary training as medical assistants, including instruction in phlebotomy. Each of the phlebotomists testified as to their training and experience and the procedures they used in drawing the appellants' blood. The city also offered the testimony of a registered nurse, Alice Cresci, who testified that the phlebotomists performed the blood draws in a medically appropriate manner. Her testimony was supported by the testimony of Dr. Leland

Rickman, a UCSD physician who specializes in infectious diseases.

The appellants offered testimony from the phlebotomy manager of Pomerado Hospital, Ted Drescher. Drescher testified that the procedures employed by AFN's phlebotomists did not comply with his hospital's disposal protocols. Drescher's testimony was supported by Leslie Revier, the Chief of Quality Assurance at UCSD clinical laboratories. He criticized the decontamination and storage practices of the AFN phlebotomists. In criticizing AFN's phlebotomists, Revier also testified that a medical history should be taken before blood is drawn and that tourniquets left on patients for more than four minutes might cause injury.

The appellants also offered testimony from a registered nurse, Patricia Hunter, who testified that it is not medically acceptable to permit phlebotomists to draw blood unless they are under the direct supervision of a physician, nurse or licensed clinical laboratory scientist.

The trial court denied the motion to suppress. The trial court found that the use of phlebotomists did not create any undue medical risk to the appellants and that the city's violation of section 23158 did not constitute a violation of the Fourth Amendment or any denial of due process or equal protection of the law. The appellants appealed to the appellate division, which certified their equal protection claim to this court. We transferred the case to our court.

B. *County of San Diego*

Four of the appellants were stopped in areas of the County of San Diego where the district attorney is responsible for prosecuting misdemeanors. Like the 19 appellants prosecuted by the city attorney, they moved to suppress the blood draws performed by AFN phlebotomists. They too argued that the use of phlebotomists violated the Fourth Amendment and deprived them of due process and equal protection of the law.

Much of the testimony used in the motion brought by city appellants was introduced in the county proceeding. In addition the county offered the testimony of a medical expert, Dr. Howard Robin. Dr. Robin was formerly a phlebotomist himself and is a licensed pathologist, the Medical Director of Laboratory Services at Sharp Memorial Hospital, director of the hospital's blood blank and a former chairman of the Physician's Committee of the California Blood Bank system. According to Dr. Robin, it is standard medical procedure in San Diego to use phlebotomists to draw blood rather than registered nurses or licensed vocational nurses. He believes phlebotomists are more proficient at drawing blood than registered or licensed vocational nurses. Robin testified that the procedure used by AFN's phlebotomists were, with one exception, medically acceptable. He criticized one phlebotomist's use of non-sterile cotton to dry disinfected venipuncture sites before inserting a needle; however, Dr. Robin testified that this created a miniscule risk of infection.

In response to questions about the length of time phlebotomists left tourniquets on patients, the storage of their equipment, their use of gloves and whether they

washed their hands, Dr. Robin testified that none of those issues was medically significant. According to Dr. Robin, it is not medically necessary that phlebotomists take a medical history before drawing blood.

The trial court denied the county appellants' motion. Like the city appellants, the county appellants appealed to the appellate division and the appellate division certified their equal protection claim. We transferred the county appellants' appeal to our court and consolidated their appeal with the city appellants' appeal.

DISCUSSION

I

Before we examine the merits of the parties' contentions, we set forth the appropriate standard of review. "On appeal from a denial of a motion to suppress evidence on Fourth Amendment grounds we review the historical facts as determined by the trial court under the familiar substantial evidence standard of review. Once the historical facts underlying the motion have been determined, we review those facts and apply the de novo standard of review in determining their consequences. Although we give deference to the trial court's factual determinations, we independently decide the legal effect of such determinations. [Citation.]" (*Esayian, supra*, 112 Cal.App.4th at p. 1038.)

II

Prior to February 11, 2004, section 23158, subdivision (a), provided in pertinent part: "Only a licensed physician and surgeon, registered nurse, licensed vocational nurse,

duly licensed clinical laboratory technologist or clinical laboratory bioanalyst, unlicensed laboratory personnel regulated pursuant to Sections 1242, 1242.5, and 1246 of the Business and Professions Code, or certified paramedic acting at the request of a peace officer may withdraw blood for the purpose of determining the alcoholic content therein." (Stats.1998, ch. 118 § 30.)

Notwithstanding the limitation set forth in former section 23158, subdivision (a), in *Esayian*, we found that a law enforcement agency did not violate the Fourth Amendment when, rather than using someone with the qualifications required by the statute, the agency used a phlebotomist to draw blood from the defendant. We stated: "The mere fact that the phlebotomist may not have fully complied with the statutory requirements of section 23158, subdivision (a) does not create a Fourth Amendment violation. There may be other remedies available to challenge governmental activity in violation of statutes and regulations. However, such violations, without more, do not render a search or seizure unreasonable within the meaning of the Fourth Amendment." (*Esayian, supra*, 112 Cal.App.4th at p. 1039; see also *People v. McKay* (2002) 27 Cal.4th 601, 607-619 [117 Cal. Rptr. 2d 236, 41 P.3d 59] (*McKay*)[3].)

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[3] In *McKay* the defendant was stopped while riding a bicycle and taken into custody for failing to present satisfactory evidence of his identity. While being searched incident to his arrest, officers discovered methamphetamine in his possession. In moving to suppress the methamphetamine, the defendant argued that he had produced satisfactory evidence of his identity and that his arrest therefore violated Vehicle Code section 40302. The Supreme Court held that any violation of the statute by the arresting officers would not support suppression under the Fourth Amendment. The court stated: "It will

(Continued on following page)

We also found that the manner in which the blood was drawn complied with the underlying protection of the Fourth Amendment as articulated in (*Schmerber v. California* (1966) 384 U.S. 757, 767 [16 L. Ed. 2d 908, 86 S.Ct. 1826].) We stated: "There is nothing in this record to justify an inference that the manner of drawing the blood was unsanitary, or subjected the suspect to any unusual pain or indignity. It is undisputed the draw was supported by probable cause and done under exigent circumstances, i.e., that the alcohol in the blood would metabolize and thus could be drawn without a prior judicial authorization. [Citation.] The trial court found

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come as no surprise . . . that the United States Supreme Court has never ordered a state court to suppress evidence that has been gathered in a manner consistent with the federal Constitution but in violation of some state law or local ordinance. To the contrary, the high court has repeatedly emphasized that the Fourth Amendment inquiry does not depend on whether the challenged police conduct was authorized by state law." (*McKay, supra*, 27 Cal.4th at p. 610, fn. omitted.) As the court explained: "What would be gained, after all, by invoking the federal Constitution to exclude evidence seized following an arrest merely because, in violation of state law, a non-uniformed police officer failed to display a badge (e.g., *Drewitt v. Pratt* (4th Cir. 1993) 999 F.2d 774, 777 [the violation of Virginia law 'did not rise to a violation of a federal constitutional magnitude']), a uniformed officer effected an arrest beyond the officer's territorial limit (e.g., *People v. Wolf* (Colo. 1981) 635 P.2d 213, 217-218 [denying the suppression motion '[d]espite the fact that the Denver police violated the statutes governing their authority to arrest']), or a deputy's commission suffered from technical administrative deficiencies (e.g., *U.S. v. Jones* (5th Cir. 1999) 185 F.3d 459, 462-463 [state law deficiency 'does not affect our analysis' of the constitutional issue])? 'The exclusionary rule was created to discourage violations of the Fourth Amendment, not violations of state law.' (*U.S. v. Walker*[(1992)] 960 F.2d [409,] 415.) Constitutionalizing the myriad of technical state procedures that govern arrests would not only trivialize Fourth Amendment protections but would discourage states from even enacting such rules. (Cf. *United States v. Caceres*[(1979)] 440 U.S. [741,] 755-756.)" (*McKay, supra*, 27 Cal.4th at p. 615.)

that the blood was properly drawn and nothing in the record compels a different conclusion." (*Esayian, supra*, 112 Cal.App.4th at p. 1041.)

Finally, we found that admission of blood evidence taken in violation of the statute did not violate the appellant's due process rights. We noted that the appellant was represented at trial by counsel who vigorously attacked the credibility of the blood evidence and that defendant presented expert testimony critical of the manner in which the defendant's blood sample was stored, preserved and processed. (*Esayian, supra*, 112 Cal.App.4th at pp. 1041-1042.) We stated: "A person seeking to overturn a conviction on due process grounds bears a heavy burden to show the procedures used at trial were not simply violations of some rule, but are fundamentally unfair. [Citations.] Ordinarily, even erroneous admission of evidence does not offend due process unless it is so prejudicial as to render the proceeding fundamentally unfair." (*Id.* at p. 1042.) Thus we concluded that even though the defendant had not raised his due process claim in the trial court, "[g]iven the nature of this record, however, even if we did not treat this issue as waived, there is nothing in the case before us to demonstrate that admission of evidence taken in violation of a statute violates the principles of due process." (*Ibid.*)

In *McHugh* a defendant again argued that blood drawn by a phlebotomist should be suppressed. In *McHugh* the blood was drawn involuntarily after the defendant refused to either take a breathalyzer test or voluntarily provide a blood sample. We presumed, as the defendants assert here, that San Diego law enforcement agencies deliberately and systematically used phlebotomists in violation of section 23158. (*McHugh, supra*, 119

Cal.App.4th at p. 211, fn. 7.) Nonetheless, we again found that violation of the statute did not require suppression of the blood evidence. "McHugh argues, however, that when a law enforcement agency deliberately and systematically violates a state statute governing the collection of evidence, a court may order the evidence suppressed. McHugh cites no pertinent authority supporting this contention, and his argument is contrary to the Supreme Court's analysis in *People v. McKay, supra*, 27 Cal.4th 601, holding that an arrest otherwise reasonable under the Fourth Amendment does not become unreasonable for purposes of the exclusionary rule merely because it was effected in violation of a state statutory requirement. [Citation.]" (*McHugh, supra*, 119 Cal.App.4th at p. 214, fn. omitted.)

On February 11, 2004, the Governor signed, as an urgency measure, Assembly Bill No. 371 (2003-2004 Reg. Sess.). It amended section 23158, which now in pertinent part provides: "(a) Notwithstanding any other provision of law, only a licensed physician and surgeon, registered nurse, licensed vocational nurse, duly licensed clinical laboratory scientist or clinical laboratory bioanalyst, a person who has been issued a 'certified phlebotomy technician' certificate pursuant to Section 1246 of the Business and Professions Code . . . may withdraw blood for the purpose of determining the alcoholic content therein."

III

As the city and county note, even if we were to go beyond the equal protection question certified by the appellate division and consider the Fourth Amendment and due process questions also raised by appellants, we

would be compelled to affirm the trial court's orders. As both *Esayian* and *McHugh* make clear, the fact that blood was taken from appellants in violation of section 23158 does not implicate their rights under the Fourth Amendment. Rather, the only Fourth Amendment question we are required to consider is whether, under the circumstances, the blood was in fact taken in a reasonable manner. As in *Esayian*, there is no dispute here that the blood was taken from the defendants on probable cause and under the exigency created by metabolization of alcohol in the defendants' respective bloodstreams. Moreover, in light of the expert testimony presented by the city and county, the trial court could conclude that the draws were performed in a manner which did not create undue harm or risk to the defendants.[4] Thus the draw did not intrude upon the defendants' Fourth Amendment rights. (See *Schmerber v. California, supra*, 384 U.S. at p. 767.)

As in *Esayian* there is no basis to conclude use of the evidence taken by the draws violated the defendants' right to due process. The defendants were fully capable of contesting the right of the law enforcement agencies to take the blood and the validity of the blood tests themselves. As in *McHugh*, we accept the defendants'

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[4] We also reject appellants' suggestion, raised for the first time at oral argument, that the failure to disclose information about the use of phlebotomists somehow implicated their rights under *Brady v. State of Maryland* (1963) 373 U.S. 83 [10 L. Ed. 2d 215, 83 S. Ct. 1194] (*Brady*). In general, we are not required to consider arguments raised for the first time at oral argument. (See *People v. Pena* (2004) 32 Cal.4th 389, 403 [9 Cal. Rptr. 3d 107, 83 P.3d 506].) Moreover, it is apparent that despite any alleged failure of the prosecution to disclose information about the phlebotomists, appellants' counsel was fully aware of the information at the time of trial. Even on the limited record before us it is clear that no due process violation occurred.

contention that the use of phlebotomists who did not meet the then-existing requirements of section 23158 was deliberate and systematic. However, as the court in *McHugh* concluded, that deliberate and systematic violation of statute does not establish any violation of the Constitution. (*McHugh, supra*, 119 Cal.App.4th at p. 214.) In this regard, like the court in *McKay*, we by no means countenance the law enforcement agencies' violation of a statute. Indeed, what the court in *McKay* said with respect to a law enforcement's violation of statutory rights designed to protect the public in general and criminal suspects in particular, bears repeating: "Violation of those rights exposes the peace officers and their departments to civil actions seeking injunctive or other relief. (*Garrett v. City of Bossier City* (La.Ct.App. 2001) 792 So.2d 24, 26-28 [although the arrest for a seatbelt offense was constitutional under *Atwater*, the arrest's failure to comply with state procedure supported a private civil suit]; see generally *People v. Mayoff* (1986) 42 Cal.3d 1302, 1318 [233 Cal. Rptr. 2, 729 P.2d 166] (plur. opn. of Grodin, J.).) Violation of those state rights also may subject the offending officer to an internal investigation, additional training, and departmental discipline. (See Heffernan, *Foreword: The Fourth Amendment Exclusionary Rule as a Constitutional Remedy* (2000) 88 Geo. L.J. 799, 865 ['A direct sanction imposed on individual officers – internal police discipline, for example – is likely to channel police behavior into patterns of legal conduct far more effectively than does the indirect sanction of exclusion'].)" (*McKay, supra*, 27 Cal.4th at pp. 618-619.)

In sum then neither the Fourth Amendment nor due process require suppression of the blood drawn from appellants.

IV

In neither *Esayian* nor *McHugh* did we consider appellants' argument that use of phlebotomists violated their right to equal protection of the law. However, their equal protection argument is no more persuasive than their Fourth Amendment and due process contentions.

"'[I]n order to establish a claim of discriminatory enforcement a defendant must demonstrate that he has been deliberately singled out for prosecution on the basis of some invidious criterion.' [Citation.]" (*Baluyut v. Superior Court* (1996) 12 Cal.4th 826, 834 [50 Cal. Rptr. 2d 101, 911 P.2d 1], quoting *Murgia v. Municipal Court* (1975) 15 Cal.3d 286, 298 [124 Cal. Rptr. 204, 540 P.2d 44].)

"'[A] denial of equal protection would be established if a defendant demonstrates that the prosecutorial authorities' selective enforcement decision "was deliberately based upon an unjustifiable standard such as race, religion, or other arbitrary classification."... In the instant case we have no occasion to consider the entire range of classifications that may be "arbitrary" in this context, i.e., that bear no rational relationship to legitimate law enforcement interests....' [Citation.]" (*Baluyut v. Superior Court, supra*, 12 Cal.4th at p. 835, quoting *Murgia v. Municipal Court, supra*, 15 Cal.3d at p. 302.)

Here the sole circumstance which made the appellants subject to prosecution was behavior which gave law enforcement agencies reason to suspect the appellants had been driving under the influence of alcohol. Thus there is no basis upon which we could conclude that prosecution of appellants was the product of any arbitrary, irrational or invidious discrimination. The fact that, *following their arrests*, they were treated differently than other drunk

driving suspects in the state, in no sense suggests that the decision to detain and prosecute them was based on any arbitrary or discriminatory factor.

Parenthetically, we note the record shows that use of phlebotomists itself was directly related to the determination by both law enforcement agencies that it was no longer economically feasible to obtain blood draws from registered nurses or other persons qualified under the former version of section 23158. The agencies' conclusion is of course buttressed by the fact that the Legislature apparently reached the same conclusion and amended section 23158 on an urgency basis to permit blood to be drawn by phlebotomists. While, again, we do not condone the agencies' decision to serve that interest in a manner not authorized by the Legislature, for equal protection purposes the critical consideration is that the *interest* the agencies were attempting to serve was a legitimate interest: enforcement of the state's drunk driving laws.

In sum, because appellants were not subjected to prosecution on any arbitrary or invidious basis and because the means employed in prosecuting them was not chosen on any arbitrary or invidious basis, they cannot assert any equal protection claim.

V

In this case and in the two cases in which we have previously considered, the conceded violation of section 23158 by the City of San Diego and the County of San Diego, *Esayian* and *McHugh*, we have consistently found that, whatever other consequence might arise from violation of the statute by these governmental entities, the suppression of probative evidence of intoxication is not a

remedy available to the defendants. As the court in *McKay* noted, instead of weakening the protection provided by such statutes as section 23158, relying on other civil and administrative remedies for statutory violations may in fact encourage state and local governments to adopt such statutory protections and alternative means of enforcing them. (*McKay, supra*, 27 Cal.4th at p. 619.) "[E]liminating the sanction of exclusion does not mean that affected individuals or the public generally are without remedy against a wayward officer. 'We, the judiciary, cannot claim that we and we alone wield the only power or possess the only wisdom to enforce rules.' [Citation.]" (*Ibid.*)

The orders are affirmed.

HUFFMAN, J., and HALLER, J., concurred.

APPENDIX B

SUPERIOR COURT OF CALIFORNIA, COUNTY OF SAN DIEGO

PEOPLE OF THE STATE OF CALIFORNIA, Plaintiff, v. ERIK MATELJAN, Defendant.	**CASE NO. M872592** **DECISION RE: CONSOLIDATED MOTION TO SUPPRESS EVIDENCE** (Filed Jan. 21, 2003)

On November 4th, 2002, 67 cases were assigned to D-18 for evidentiary hearing on filed motions to suppress under Penal Code section 1538.5. The 67 cases were consolidated under one lead case; Eric H. Mateljan (Case Number M872592). Each defendant was arrested and charged with violating California Vehicle Code sections 23152, (a) and 23152, subdivision (b). Each defendant entered a plea of not guilty to the charges and brought a motion to suppress evidence of his or her blood sample.

The motions are consolidated due to the common contention that the blood sample was obtained in violation of the Fourth Amendment prohibition against unreasonable search and seizure. Due to the number of consolidated cases, the individual probable cause issues are reserved pending resolution of the alleged Fourth Amendment violation.

The common issues raised in the motions to suppress are: (1) Vehicle Code section 23158(a) [hereafter referred to as VC] limits the class of people authorized to draw blood. (2) Use of an unauthorized person in violation of VC

23158(a) warrants the suppression of evidence. (3) VC 23158(a) was enacted to protect the health, safety and welfare of the citizens. (4) The SDPD, SDSO and the CHP have deliberately and systematically violated California law. (5) The questioned blood draws were not conducted in a reasonable, medically-approved manner.

STATEMENT OF FACTS COMMON TO EACH CASE

Each driver was stopped by law enforcement officers and evaluated for driving under the influence. The stops occurred in the County of San Diego and were conducted by members of the San Diego Police Department, San Diego Sheriffs Department, San Diego Harbor Police or the California Highway Patrol. Each stop was conducted after officer(s) observed questionable driving patterns ranging from speeding, weaving within the lanes, unsafe lane changes, or reckless driving. One evaluation occurred after an officer made contact with a stranded motorist.

Contact with the drivers of the vehicles led to the observation of objective symptoms of alcohol consumption. Field evaluations were conducted and the drivers were arrested for violations of Vehicle section 23152(a) and (b). In each case a blood sample was obtained.

Phlebotomist, employed by American Forensic Nurses, hereafter referred to as "AFN", conducted the blood draws upon request from the arresting agencies. The blood samples were taken by phlebotomist Ms. Kim Dominguez, Ms. Michelle Lee, Ms. Stacy Walker, Ms. Stephanie Rider, and Mr. Tony Ramirez.

KIM DOMINGUEZ

Ms. Dominguez received a certificate in Phlebotomy in January '98 from Grossmont Health Occupation located in Santee California. She began her training in '97 with 90 hours of health care fundamentals, followed by a four month Phlebotomy course, a 120 hour internship, and successful blood draws under supervision. Her employment with AFN began in '98 and ran through October of 2002. During the course of her employment with AFN she performed approximately 50-60 blood draws a week.

The equipment for the blood draw consisted of 21/22 gauge needles (each individually sealed), skin wipes, tape, cotton balls, gloves tubes and sharps container. These supplies were obtained from AFN and stored in a plastic container (toolbox).

Ms. Dominguez testified to the following procedure: . . . put on gloves, put on a tourniquet, feel for a vein, palpate the vein with a gloved finger, clean the skin with a benzalkonium chloride. I then insert needle in the vacutainer, insert that into the vein, put the tube into the back of the vacutainer holder, fill the tube, take the tube out, invert the tube to mix the blood with the preservative and the anticoaqulant [sic]. The tourniquet comes off, the needle come out, pressure is applied with a cotton ball. The needle is placed in a sharps container.

MICHELLE LEE

Ms. Lee received a certificate as a medical assistant from Kelsy-Jenny College in 1994. This training included a course on phlebotomy and 50 blood draws under the supervision of a physician and an RN. In 2000 Ms. Lee

took additional training in phlebotomy at Boston Reed and received a certificate on completion. While employed with AFN she conducted approximately 1500 blood draws.

Ms. Lee testified to her procedure as follows: She gathered her material which is stored in a container. Her material consist [sic] of cotton balls, tape, needles, vacutainer holder, tubes and a tourniquet and benzalkonium chloride. Locate the vein, put on gloves, place the tourniquet, clean the area with the benzalkonium chloride (swab the site), break the seal on the needle, insert the needle into the vacutainer, insert the needle into the vein, insert the tube into the holder, collect the blood, remove the full tube, insert the second tube, invert the first tube eight to ten times, repeat with the second tube. Put a cotton ball over the site, pull out the needle, check the site, tape a cotton ball down, dispose of the needle in the sharps container.

STACY WALKER

Ms. Walker testified she completed a formal course in phlebotomy at De Anza College in 1999. This course was conducted under the supervision of a medical technologist with two and a half months of class time dedicated to phlebotomy. There she learned how to conduct blood draws and actually drew blood from 40 people in order to pass the course. She did her externship at El Camino Hospital and conducted 200 additional blood draws. While employed at AFN she conducted over 1000 blood draws.

Ms. Walker testified to her procedure as follows: She assembled the supplies needed, meaning the proper vials, the touniquet [sic], the vacutainer, the needle, a gauze pad or cotton swab and gloves. I assemble the proper size

needle, getting the cleaning agent (benzalkoniun [sic] chloride) and the tourniquet. I find the appropriate vein to use, palpate the vein. I swab the area with the cleaning agent and then I insert the needle into the vein and withdraw blood. I then remove the tube of blood and invert it.

STEPHANIE RIDER

Ms. Rider testified that she received training as a respiratory therapist from the Flagler Career Institution. The training included drawing blood and conducting 10 blood draws. She received additional training in phlebotomy from the Family Health Institute. Again conducting 10 blood draws to obtain a certificate. Prior to working for AFN she worked for MDSI and conducted 30-40 blood draws. In the course of her employment with AFN Ms. Rider conducted 500 to 1000 blood draws.

Ms. Rider testified to her procedure as follows: I find the vein, put gloves on, tie on the tourniquet to the upper arm, palpate the vein, gather my equipment, change gloves if necessary, clean the area, inspect my equipment, insert the needle into the vacutainer, insert the needle into the vein, fill the tube, pull out the tube invert it, remove the needle and place a cotton ball on the vein and maintain pressure.

TONY RAMIREZ

Mr. Ramirez attended Kelsy-Jenny College and received a certificate upon completion of training as a medical assistant in 1998. It was a nine-month course that included training in phlebotomy. Certification required 10

supervised blood draws and an externship. He completed an eight-week externship at the Third Ave. Clinic. 100 blood draws was [sic] required for a certificate. He began working for AFN in 1997.

Mr. Ramirez testified to his blood draw procedure as follows: He gathered his equipment, looked for a vein, tied on the tourniquet and then palpated the vein. He would then clean the site, insert the needle into the vacutainer and holder, puncture the vein, fill the tubes, release the tourniquet, and place a cotton ball on the site.

Each of the phlebotomist [sic] testified that the procedures they employed on the challenged draws were consistent with their training. The phlebotomist [sic] testified that there were no unusual occurrences in the blood draws. The exception was an individual that licked or sucked the draw site.

In support of the contention that the blood draws were completed in a reasonable, medically approved manner, the people called as a witness Ms. Alice Cresci. Ms. Cresci is a registered nurse (RN) at Pomerado Hospital in Poway California. She has been a RN since 1976. She has worked in a nursing capacity for her entire career and preformed approximately ten thousand I.V.'s. Ms. Cresci stated it is a common practice that a registered nurse learn how to do blood draws on the job. In fact that is how she learned to do draws in 1976. She testified that the procedures phlebotomist use in hospitals to draw blood is the same basic procedure she learned and continues to practice to this day. Ms. Cresci described her procedure for a blood draw as follows:

I would assemble the equipment and inspect the arm. I would put on gloves and would put the tourniquet on the

upper arm and palpate the vein to get the best rise possible. I would clean the site with benzalkorium chloride. Once the site is clean I would not touch it again. I put the needle into the vein. Pop my tube into the vacutainer so that the blood could come out. As the blood flows I release the tourniquet. When the tube is full I pull out the needle. Put a gauze on the site, apply pressure to the site and cover with a band aid or tape.

Ms. Cresci opined that the procedures followed by the phlebotomist would meet acceptable medical standards. She stated that as long as the supplies are kept clean and dry, the location of the storage is not something that would make the practice unreasonable. The physical location of the blood draw would not make the procedure medically unsafe according to Ms. Cresci.

The defendants offered the testimony of Mr. Ted Drescher, Phlebotomy manager at Palomar-Pomerado Hospital, Mr. Leslie Revier, Manager of Quality Assurance Program for Clinical Laboratories, UCSD. By stipulation the testimony of Dr. Anna Drylinger and Dr. Jon Rosenberg was admitted. Dr. Rosenberg opined that the medical profession considers the drawing of blood is an inherently dangerous activity. Dr. Drylinger would take a position opposite that of the Dr. Leland Rickman. Rickman opined that there are no true community standards for drawing blood. There are OSHA regulation, guidelines and policy. He further stated that hospital standards are often over inclusive. Storage of equipment varies and the fact that something may not be medically perfect does not mean it is medically unreasonable.

ANALYSIS

I.

VIOLATION OF VEHICLE CODE SECTION 2315(A) [sic]

As noted above the defendants basic premise is that a violation of VC 23158(a) constitutes sufficient grounds to suppress evidence. VC 23158(a) provides in pertinent part:

> (a) Only a licensed physician and surgeon, registered vocational nurse duly licensed clinical laboratory technologist or clinical laboratory bioanalyst, unlicensed laboratory personal [sic] regulated pursuant to sections 1241, 1242, and 1246 of the Business and Professions Code or certified paramedic acting at the request of a peace officer may withdraw blood for the purpose of determining the alcoholic content therein.

The people concede the phlebotomist employed by AFN do not fall within the language of VC 23158(a) and cannot be read into the statute by the language in BP code 1241, 1242 and 1246. The evidence adduced at this hearing is undisputed that AFN is not a licensed clinical laboratory and that the phlebotomist conducting the blood draws are not licensed within the meaning of VC 23158(a). This court finds that it is a violation of VC 23158(a) when an unlicensed phlebotomist withdraws blood at the request of law enforcement for the purpose of a DUI investigation.

As to the question of whether or not a violation of VC 23158(a) warrants the suppression of the evidence the court looks first to the language to the statute.

Of obvious note is that the statute does not expressly authorize the exclusion of evidence. The defendants have asked the court to consider the argument that the use of

the word *only* in VC 23158(a) is controlling language that mandates the exclusion of the evidence. The defendants contend that the use of unlicensed phlebotomist triggers the exclusionary rule because the word *only* clearly intended to limit the class of people that could draw blood.

In support of this contention the defendants ask the court to take notice of the recent Texas case of *People v. Laird* (2001) 38 S.W. 3d 707. The *Laird* court suppressed the evidence because it was obtained in violation of Texas state law regarding DUI blood withdraws. Article 38.23 of the Texas Code of Civil Procedure provides:

> " . . . no evidence obtained by an officer of other person in violation of any provision of the Constitution or laws of the State of Texas . . . shall be admitted in evidence against the accused in the trial of any case."

While this court agrees with the position that the use of unlicensed phlebotomist violates VC 23158(a) I do not agree that the violation in and of itself warrants the exclusion of the evidence obtained.

In 1982 the will of the people of the state of California was expressed with the passage of Proposition 8. Proposition 8, commonly referred to as the "right to Truth-in-Evidence," added section 28 subdivision (d) to article I of the California Constitution. This section provides inter alia:

> "Except as provided by statute hereafter enacted by a two thirds vote of the membership in each house of the legislature, relevant evidence shall not be excluded in any criminal proceeding, including pretrial and post conviction motions and hearings . . . "

This language clearly restricts the courts ability to exclude evidence outside of statutory provisions. The scope of Proposition was addressed in the case of *In re Lance W.* (1985) 37 Cal.3d 873, 879. The court determined that Proposition 8 eliminated the courts opportunity to create a remedy for violations of the search and seizure provisions except where exclusion is federally compelled.

This issue was most recently addressed in *People v McKay* (2002) 27 Cal.4th 601. In addressing the defendants contention that evidence seized in violation of Vehicle Code section 40302 the court expressed an obvious level of reluctance to hinder a states right to perform state functions. The Court observed:

> "It will come as no surprise, then that the United States Supreme Court has never ordered a state court t [sic] suppress evidence that has been gathered in a manner consistent with the federal Constitution but in violation of some state law or local ordinance. To the contrary the high court has repeatedly emphasized that the Fourth Amendment inquiry does not depend on whether the challenged police conduct was authorized by state law." (Id., at p. 610.)

In *Cooper v. California* (1967) 386 U.S. [87 S.Ct. 788, 17 L.Ed.2d 730] the defendant challenged the search of his vehicle as a violation of the states forfeiture statute. The court opined "the question here is not whether the search was authorized by state law. The question is rather whether the search was reasonable under the Fourth Amendment." (Id. At p. 61.)

In the instant matter it is clear that the state statue excludes the use of phlebotomist. It is also clear that the San Diego Police Department and others were aware of

this. As early as September of 1999 law enforcement agencies were aware that AFN was not using registered nurses. The practice continued until the end of September of 2002 when AFN released the phlebotomist in question.

The defendants next contend that the knowledge of this violation is evidence of a deliberate and systematic violation of law warranting suppression of the evidence. In support of this contention the defendants cite *In re Garinger* (1987) 188 Cal.App.3d 1149. The defendants in this case make the same argument as that in *Garinger,* that a deliberate and systematic violation of a statute warrants exclusion based upon the equal protection clause.

This court draws a distinction between the failure to advise a person of an opportunity to preserve evidence, which in no uncertain terms is a violation of due process, and the use of a person to draw blood who is not authorized under VC 23158(a). The court finds that the violation of VC 23158(a) does not warrant the suppression of the evidence. However it does raise the issue of whether the seizure of the defendant's blood was constitutionally permissible.

It should be understood that this court views the conduct of AFN and law enforcement agencies as unacceptable. However, this court is not persuaded by the argument that the suppression of evidence is an acceptable means of dealing with the violation of this sort. This court accepts the defendants argument that VC 23158(a) was enacted to protect the health, safety and welfare of the citizens of this state. This was done to address concerns that untrained individuals would be involved in a process of extracting blood from a person and thereby subject the citizens of this state to undue risk.

An analysis of this risk is necessary to determine whether the use of the phlebotomist is constitutionally permissible.

II.

DOES THE USE OF UNAUTHORIZED PHLEBOTOMIST VIOLATE THE FOURTH AMENDMENT TO THE UNITED STATES CONSTITUTION

The defendants contend that the use of phlebotomist constitutes an unreasonable search and seizure. The weight of this argument comes down to whether or not the procedures employed by the phlebotomist in question are contrary to the prohibition against unreasonable search and seizure.

In this case, a great amount of time and energy was expended on the term "reasonable, medically approved manner."

In *Schmerber v. California* (1966) 383 U.S. 757, the defendant was convicted of driving while under the influence of alcohol. At the direction of the police, a blood sample was taken, in a hospital, from the defendant by a physician. The defendant contended that the withdrawal of blood was an unreasonable search and seizure in violation of the Fourth Amendment. The Supreme Court held that an arrestee for DUI may be required to submit to a blood test provided that "the means and procedures employed in taking the blood respect relevant Fourth Amendment standards of reasonableness." (ID. At p. 768.) In *People v. Ford* (1992) 4 Cal.App.4th 32, 35-36, "the courts of this state have frequently summarized *Schmerber* as permitting warrantless compulsory seizure of blood

for the purpose of a blood-alcohol test if the procedure (1) is done in a reasonable, medically approved manner, (2) is incident to a lawful arrest, and (3) is based upon reasonable belief the arrestee is intoxicated.

In *People v. Ford.* the defendants blood was drawn by a technologist at the police station. He argued that the technologist was unauthorized to withdraw blood under VC 23158(a). Further argument centered on the location of the draw, contending that the police station was not a medically approved location. The defendant contended that based on these facts the sample was not taken in a medically approved manner.

The court rejected the defendant's arguments and refused to suppress the evidence. The court stated that " . . . evidence taken in violation of a state statute is not inadmissible unless the statutory violation also has a constitutional dimension." (Id., at p.37.) The issue was narrowed further when the court stated the issue was whether " . . . the manner in which the sample was obtained deviated so far from the medical practices found to be reasonable in *Schmerber* as to render the seizure constitutionally impermissible." (Id., at p. 37.)

The court in *Schmerber* made several observations regarding the extraction of blood samples. All of which appear to be based on a practical and common sense approach to the reality of obtaining a blood sample. In analyzing the need to secure blood evidence the court noted the following: See *Breithaupt v. Abram*, 352 U.S., at 436, n. 13, " . . . Such test [sic] are a common place in these days of periodic physical examination and experience with them teaches that the quantity of blood extracted is minimal, and that for most people the procedure involves

virtually no risk, trauma, or pain." (Id., at p. 771) Further in FN 13, "The blood test procedure has become routine in our everyday life . . . " *Breithaupt v. Abram*, 352 U.S., at 436.

In the instant matter this court finds the phlebotomist conducting the blood draws were trained, skilled and experienced. Each attended courses lasting three or four months, consisting of instruction on the mechanics of blood extraction. Each student was required to successfully complete hands on training to include supervised blood draws. They participated in internships or externships consisting of 100-200 blood draws. The average number of years of experience for the questioned phlebotomist was four years, and each had conducted 500-1000 or more blood draws.

The testimony of the phlebotomist regarding the storage of the supplies/equipment was basically the same for each. The equipment was stored in plastic toolboxes or similar containers. These containers were kept clean. When not in use the containers were stored in vehicle trunks, garages or home closets. The needles were in packs of 50-100 and were individually sealed within the pack. Cotton swabs, skin wipes, tourniquets, vacutainer and vacutainer holders were clean and dry.

The procedures followed (see statement of facts) for each draw was consistent with the procedure taught in the certification courses.

The majority of the blood samples were taken in locations other then a hospital, to include room 138 of the SDPD central headquarters, SDSO central jail facility and Pacific Coast Highway office of the CHP. It is clear from the evidence that the environments were not sterile,

aseptic or disinfected. Of note is the fact that one expert stated that an emergency room in a hospital is not sterile but only disinfected on a regular basis throughout the day.

This is where the real world collides with the policy, procedures, regulations, codes and guidelines. I note that Dr. Rickman stated that "hospital regulations are often over inclusive." Placed in the context of the nature of the business of a hospital or clinical laboratory this "over inclusiveness" is understandable. The goal is to provide health services to the public and ensure the health, safety and welfare of all to come seeking assistance. Simply put, do not increase the injury or risk of injury to citizens when performing this health function.

The defendants contend that in order to ensure that the health, safety and welfare of the citizens is protected, strict adherence to governing policy and procedure is necessary. Any deviation will invite an unjustifiable element of personal risk of infection and pain. That improperly stored equipment can lead to infection. That improperly stored equipment in an indication of poor training that ultimately reflects on the quality of the blood draw itself. That conducting a blood draw in a location other than a hospital exposes citizens to pathogenic organisms. That "forced" blood draws on a person being held down or secured to a chair creates an unacceptable risk.

The defendants argue that the Fourth Amendment is "prospective" and any one of the listed deviations is an unacceptable violation of the prohibition against unreasonable search and seizure that triggers the exclusionary rule. Much was made of the lack of precautions in storage of equipment, lack of knowledge of policy and procedures,

inadequate safeguards and general disregard for the health, safety and welfare of the citizens subjected to blood draws in DUI investigations.

The defendants placed a great deal of emphasis on the fact the equipment was exposed to temperatures that exceeded specifications established by the manufactures of then needles and vacutainers. Although Dr. Revier is of the opinion that the deviations noted in the storage of supplies takes the process outside of the accepted medical practice in this or any other community. This court cannot escape the fact that the state of the evidence indicates that there was no increased risk of infection or pain. In fact the evidence indicates that all equipment was clean and dry, handled in accordance with proper training and consistent with accepted every day practices.

This court is not persuaded by the argument that the prospective harm is where the focus should be. As noted in *Breithaupt v. Abram*, 352 U.S. . at 436 " . . . such test [sic] are common place . . . " It is the routine nature of the procedure that leads this court to conclude that the practices of the phlebotomist who conducted the blood draws were not unreasonable. In a careful review and consideration of all the evidence this court cannot say the blood draws exposed the defendants to an " . . . unjustifiable element of personal risk of infection or pain." Applying the factors set forth in *Schmerber* I conclude that the blood draws were made in a reasonable, medically approved manner therefore the motions to suppress evidence are denied.

IT IS SO ORDERED.

DATED: January 21, 2003 /s/ Browder Willis
BROWDER A. WILLIS
Judge of the Superior Court

APPENDIX C

Superior Court of the State of California
County of San Diego

THE PEOPLE OF THE STATE OF CALIFORNIA, Plaintiff, v. BENJAMIN FANALE, et al., Defendants.	**Case Nos.** CN145324; CN147371; CN149285; CN150590; CN148986; CN147525; CN147900; CN148819; CN146424; CN150041; CN148294; CN151666; CN149604; CN150110; CN148213; CN148673; CN148268; CN144924; CN152327; CN151675; CN150898; SCN144558 **DECISION RE: MOTION TO SUPPRESS BLOOD EVIDENCE** (Filed Mar. 19, 2003)

The above listed defendants filed motions to suppress the blood evidence in their respective cases in which they were charged with various Vehicle Code violations which involved driving under the influence of alcohol. This decision addresses only the admissibility of blood evidence which was taken by a phlebotomist. Any unrelated suppression issues regarding the individual cases have been separately addressed by this Court. Defendants make various arguments in support of their motions including:

1. The blood samples should be suppressed because they were taken in violation of Vehicle Code section 23158(a);

2. The blood draw was an unconstitutional violation of the Fourth Amendment as discussed in *Schmerber v. California* (1966) 384 U.S. 757;

3. There has been a systematic, deliberate violation of Vehicle Code section 23158 which requires suppression because it violates Defendants' Equal Protection and Due Process Rights.

I.

VIOLATION OF VEHICLE CODE SECTION 23158(a)

There is no factual dispute that the phlebotomists do not fall under any of the categories named in Vehicle Code section 23158(a). The People have conceded that the phlebotomists who were employed by American Forensic Nurses did not meet the requirements of Vehicle Code section 23158(a). The Defendants assert that Vehicle Code section 23158(a) itself provides a basis for suppression of the blood evidence because it was enacted to protect public health and any violation thereof threatens public health.

Defendants assert, citing *People v. Rehman* (1967) 253 Cal. App.2d 119, 161, that the right to inject a needle for purposes of obtaining a blood sample is based on the state's interest in protecting public health and that competency to do so is evidenced by a license issued by the state. *Rehman* was a case wherein the parties were being prosecuted for unlicensed practice of medicine. While acknowledging that the purpose of Vehicle Code section 23158 relates to public health, the issue at hand for this Court is whether suppression of evidence is authorized whenever there has been a failure to comply with the statute. There is no case law authorizing this Court to suppress evidence solely on the basis of a failure

to provide licensed personnel to draw blood. Absent more, the California Constitution requires that the statutory violation herein not result in suppression of evidence.

Article I, Section 28, Subdivision (d) of the California Constitution was enacted in 1982 as part of Proposition 8. Entitled "Right to Truth-in-Evidence," it provides: "Except as provided by statute hereafter enacted by a two-thirds vote of the membership in each house of the legislature, relevant evidence shall not be excluded in any criminal proceeding, including pretrial and post-conviction motions and hearings, or in any trial or hearing of a juvenile for a criminal offense, whether heard in juvenile or adult court. Nothing in this section shall affect any existing statutory rule of evidence relating to privilege or hearsay, or Evidence Code, Sections 352, 782 or 1103. Nothing in this section shall affect any existing statutory or constitutional right of the press."

Defendants contend that because revised Vehicle Code section 23158(a) was reenacted in 1988 by Senate Bill 1186 by more than two-thirds vote of the membership of the legislature, it provides for exclusion of blood taken by the phlebotomists. However, Senate Bill 1186 did not make any substantive changes in VC 23158(a), a statute which was initially enacted in 1972. It was simply revised or renumbered to make the Vehicle Code easier to use. More importantly, there is NO mention of exclusion of evidence as a remedy if blood is taken in violation of Vehicle Code 23158(a).

"In general, relevant evidence that is illegally obtained under California law is nonetheless admissible, so long as federal law does not bar its admission. (See Cal. Const., art. I, § 28, subd. (d); *People v. May* (1988) 44

Cal.3d 309, 319, 243; Cal Rptr. 369, 748 P.2d 307; *In re Lance W.* (1985) 37 Cal.3d 873, 886-887, 210 Cal.Rptr. 631, 694 P.2s [sic] 744; *Ahmad A. v. Superior Court* (1989) 215 Cal.App.3d 528, 534-536, 263 Cal.Rptr. 747.)" *People v. Hines,* (1977) 15 Cal.4th 997, 1043, 1044.

"[T]he 'Truth-in-Evidence' provision of our Constitution was probably intended by the California voters as a means of (1) abrogating judicial decisions which had required the exclusion of relevant evidence solely to deter police misconduct in violation of a suspect's constitutional rights under the state Constitution, while (2) preserving legislatively created rules of privilege insulating particular communications, such as the attorney-client or physician-patient privilege. As we recently observed, 'The people have apparently decided that the exclusion of evidence is not an acceptable means of implementing those rights, *except as required by the Constitution of the United States.*' (*In re Lance W.*, supra, 37 Cal.3d 873, 887, italics added.)" *People v. May* (1988) 44 Cal.3d 309, 318.

There is no legislatively created authorization for suppression of evidence which is taken in violation of Vehicle Code section 23158(a). As such, the mere fact that there is a violation of a state statute is no basis for suppression of the blood evidence.

II.

ALLEGED VIOLATIONS OF THE FOURTH AMENDMENT

Defendants assert that the blood draws violate the Fourth Amendment because of the high degree of risk surrounding them. They rely upon the language in *Schmerber v. California* (1966) 384 U.S. 757, which

requires that blood be taken in a "reasonable manner" and "according to accepted medical practices." Defendants equate the use of phlebotomists to draw blood to blood tests "administered by police in the privacy of the station-house," an example set forth in the *Schmerber* opinion. "To tolerate searches under these conditions might be to invite an unjustified element of personal risk of infection and pain." *Schmerber* at 772.

Defendants also rely on *Winston v. Lee* (1985) 470 U.S. 753. In that case the Court used a balancing test suggested by *Schmerber*. It determined that the risk of harm posed by surgery to remove a bullet should be weighted against the State's need to secure the bullet as evidence. It found that the risk of harm in a surgical procedure outweighed the State's rather minimal requirement for evidence, particularly where the bullet may not even have provided the desired evidence.

The *Schmerber* Court observed that blood tests do not constitute an unduly extensive imposition on an individual's personal privacy and bodily integrity and that a blood test is "a highly effective means of determining the degree to which a person is under the influence of alcohol." *Id.*, at 771.

Defendants suggest that because phlebotomists are not listed as qualified personnel under Vehicle Code section 23158(a), blood tests that they conduct necessarily cause risk. They suggest that Vehicle Code section 23158(a) is co-extensive with the Fourth Amendment. They base this on the fact that Vehicle Code section 23158(a) was enacted as a result of the *Schmerber* decision. While the ruling in *Schmerber* apparently gave the legislature the impetus to enact Vehicle Code section

23158(a), there is no implication that a blood test which was not properly obtained pursuant to Vehicle Code section 23158(a) would, necessarily, violate the Fourth Amendment or the requirements of *Schmerber*.

In *People v. Ford* (1992) 4 Cal. App. 4th 32, the defendant argued that because his blood was drawn by someone unauthorized to draw blood under Vehicle Code section 23158 his blood sample was, necessarily, not drawn in a medically approved manner. In *Ford*, the defendant's blood was taken without his informed consent, though it was standard medical practice to draw blood only after informed consent had been obtained, and the blood draw occurred in a jail, rather than in a hospital setting. As in the cases before this Court, the testimony taken in *Ford* indicated that the blood draw complied with medically accepted standards and there was nothing to suggest that the area of the blood draw posed a health risk to the defendant.

Rejecting the defendant's arguments that the blood test evidence should be suppressed, the *Ford* Court concluded that the issue was not whether the person obtaining the sample was authorized by statute to do so, but "whether the manner in which the sample was obtained deviated so far from the medical practices found to be reasonable in *Schmerber* as to render the seizure constitutionally impermissible." *Id.*, at 37. The Court also rejected the argument that a lack of informed consent required suppression of the blood test evidence, ruling "Informed consent . . . has no application here. The very point of *Schmerber* is that blood may be withdrawn without consent." *Id.*, at 36.

Based upon the balancing test established in *Schmerber,* and reiterated by the Court in *Lee,* the blood draws in the instant cases would only be violative of the Fourth Amendment if the degree of risk of infection and pain was greater if the blood was taken by a phlebotomist rather than by the personnel listed in Vehicle Code section 23158(a). The evidence presented at the evidentiary hearing did not establish that there was any increased risk of pain or infection when the blood was taken by a phlebotomist, rather than by the personnel who were authorized under Vehicle Code section 23158(a).

III.

VIOLATION OF DUE PROCESS AND EQUAL PROTECTION

Defendants cite *In re Garinger* (1987) 188 Cal. App.3d 1149, arguing that a deliberate and systematic violation of Vehicle Code section 23158(a) warrants exclusion. In *Garinger,* Defendant argued that there was a policy of the Riverside Police Department not to advise drunk driving suspects of the right to procure a blood test or urine test which could be saved as evidence, while the breath test could not be preserved. The Court found that the statute it discussed, Vehicle Code section 23157.5, was passed as emergency legislation in 1983 to provide a constitutional procedure for administering breath tests in light of the decision in *People v. Trombetta* (1983) 142 Cal.App.3d 138, a case which was later overturned by the U.S. Supreme Court. The *Garinger* Court found that unless there was a deliberate and systematic violation of this Vehicle Code section, suppression was not the proper remedy for such violation.

Because the *Garinger* Court found no deliberate and systematic violation of Vehicle Code section 23157.5, its determination that suppression would be a proper remedy for such deliberate and systematic violation, was dicta. While dicta may constitute persuasive reasoning, the *Garinger* case does not state any legal basis for the referenced opinion. The only case law which it cites in this regard is *California v. Trombetta* (1984) 467 U.S. 479. There is no mention of deliberate and systematic violation of a statute in *Trombetta* nor does the *Trombetta* Court indicate that such a violation would result in a denial of Due Process or that suppression would be a proper remedy for such a violation.

Further, even assuming that this Court were to follow the dicta in *Garinger,* the facts here are readily distinguishable. Here, unlike *Garinger,* the statute which law enforcement failed to comply with was not designed to advise defendants of their rights to procure evidence. Presumably the reference to *Trombetta* in *Garinger* relates to *Trombetta's* holding regarding the preservation and destruction of evidence. Following the reasoning of the *Garinger* Court, if there was a deliberate and systematic violation of a statute regarding preservation of evidence, suppression could then be the proper remedy. However, the failure to use personnel authorized by statute to draw blood is not akin to the failure to advise defendants of their rights regarding preservation of the blood evidence. Only if the phlebotomists were found to have improperly preserved or processed the blood evidence could this argument potentially apply under the *Garinger* analysis. There was, however, no conclusive evidence presented that the blood obtained in the various cases before this Court was not processed or preserved properly. As such, there

was no Due Process deprivation in the matters before this Court.

Defendants' claim that the use of phlebotomists violated the Equal Protection Clause of the United States Constitution is also misplaced. Equal Protection applies to disparate treatment between members of an identifiable class of, persons in similar circumstances. No identifiable class of persons exists here. Defendants claim that they are a class of persons. There are two possible definitions for their "class" as recognized by the Court in *Nelson v. City of Irvine* (1998) 143 F.3d 1196. The first, is that they consist of all people in San Diego County whose blood was taken by a phlebotomist, as opposed to Californians in other counties whose blood was taken in compliance with Vehicle Code section 23158(a). The defendants appear to argue that DUI arrestees in San Diego County have been arbitrarily singled out and deprived of their rights. However, this argument fails because San Diego County did not create a classification scheme among those arrested within the jurisdiction. *Id.*, at 1205.

The second classification the defendants suggest relates to people within San Diego County whose blood was taken by a phlebotomist, as opposed to those within the county whose blood was taken by a person qualified under Vehicle Code section 23158(a). However, they are only in such a class because their blood was arbitrarily taken by personnel who do not fall under Vehicle Code section 23158(a). "By such reasoning, an equal protection claim would arise whenever a law was enforced with something less than perfect regularity." *Id.*, at 1205. The defendants are attempting to make an equal protection claim because there was inconsistent use of personnel authorized under Vehicle Code section 23158(a). These

inconsistencies cannot give rise to a "class" for purposes of Equal Protection.

IV.

CONCLUSION

Though it is undisputed that there was a continual violation of Vehicle Code section 23158(a), in each of the cases before this Court, suppression of the blood evidence is not the proper remedy. Though this Court does not in any way condone this violation of the law by any law enforcement agency, Article I, Section 28, Subdivision(d) of the California Constitution prohibits suppression of evidence as a remedy for violation of a statute, unless authorized by that statute, or unless a violation of a Federal Constitutional right has occurred.

This Court finds no violation of the Fourth Amendment as discussed in *Schmerber v. California* (1966) 384 U.S. 757 because the testimony revealed that the blood was taken in a "reasonable manner" and "according to accepted medical practices." Though there has been a deliberate and systematic violation of Vehicle Code section 23158(a), exclusion of the evidence is not warranted, given that dicta found in *In re Garinger* (1987) 188 Cal. App.3d 1149 is inapplicable here. Equal Protection claims must also fail because there is no identifiable class of persons in the matters at bar.

This Court's ruling regarding the defendants' motion to suppress blood evidence does not impact the ability of a trial Court to impose appropriate sanctions resulting from non-compliance with Vehicle Code section 23158, including, among other things, the submission of a limiting jury

instruction to the fact finder. Other remedies, including civil remedies, may also be available to each of the defendants. However, suppression of the blood evidence is not an appropriate remedy based on any of the evidence received and arguments which have been made before this Court. As such, the consolidated and individual motions for suppression of the blood evidence are hereby denied.

IT IS SO ORDERED.

Dated: MAR 19 2003

/s/ K. Michael Kirkman, Judge
K. MICHAEL KIRKMAN
JUDGE OF THE
SUPERIOR COURT

APPENDIX D

Court of Appeal, Fourth Appellate District,
Division One – No. D044282
S134975

IN THE SUPREME COURT OF CALIFORNIA

En Banc

(Filed Aug. 24, 2005)

THE PEOPLE, Plaintiff and Respondent,

v.

ERIK HANS MATELJAN, Defendant and Appellant.

Petition for review DENIED.

GEORGE
Chief Justice

APPENDIX E

OFFICE OF
THE CITY ATTORNEY
CITY OF SAN DIEGO

Casey Gwin
CITY ATTORNEY

[Names And Address Omitted In Printing]

November 26, 2002

Ms. Mary Prevost, Attorney at Law
3115 Fourth Avenue
San Diego, CA 92103

Dear Ms. Prevost:

Public Records Act Request Dated October 28, 2002

This is in response to your request for records dated October 28, 2002, related to the City's use of phlebotomists to draw blood in DUI cases. The responsive documents in our possession have now been identified and copied, and are available for you to pick up, with the exception of one piece of correspondence between this office and the San Diego Police Department which is not being disclosed because it is attorney-client privileged. Cal. Gov't Code § 6254(k).

The documents are available at the Discovery Window located in the Civic Center Plaza Building, 1200 3rd Avenue, Suite 700, San Diego. You will be charged a total of $16.80 for 112 documents at 15 cents per page.

If you have any questions regarding this matter please feel free to call me at (619) 533-5850.

Sincerely yours,

CASEY GWINN,
City Attorney

by /s/ Lisa A. Foster
Lisa A. Foster
Deputy City Attorney

LAF:jab

From: "Jeff Thompson" <jdmathompson@earthlink.net> **Add to Address Book**

To: <tzfan@yahoo.com>

Subject: blood draws

Date: Sat, 20 Mar 1999 14:35:41 -0800

John

the vehicle code specifies (133582 or 231582) who, but basically it is someone who has completed a state administered test to get their position (ie- med tech, paramedic, MD, bioanalyst, RN, LVN (licensed vocational nurse), etc), & phlebotomists cannot unless under the supervision of an MD.

It gets real specific (how readily the MD can get there, etc – you have to hunt the regulations a little for the specifics). We had one of our jailers get a certificate & start drawing & our city atty told him it was OK (they never asked us). But, when a felony DUI hired a noted DUI atty, he got the jailer/phleb. to admit at a pre-trial hearing that he had no independent recollection of drawing that blood. Without that, & without the presumption

that it was done in a medically approved manner (which comes from having the "LEGAL" people do it), there was no showing that it WAS done in a medically approved manner, so the judge threw out the blood sample & therefor the result.

Really simple, huh?

[Patti: Jeff never says what he uses. Neither did Marty. /s/ T]

From: "Jeff Thompson" <jdmathompson@earthlink.net> **Add to Address Book**

To: "john simms" <tzfan@yahoo.com>

Subject: Re: blood draws – PPPS

Date: Mon, 22 Mar 1999 21:57:21 -0800

John –

A PS on my earlier email. I am only citing what happened on one case for us – as soon as it happened, the DA called the jail & told them to stop having that jailer draw blood from DUI's anymore. He had drawn quite a few, & there were no problems with the others, because they were not effectively challenged.

Jeff

From: john simms <tzfan@yahoo.com>
To: Jeff Thompson <jdmathompson@earthlink.net>
Subject: Re: blood draws – PS
Date: Monday, March 22, 1999 11:52 AM

Jeff, according to your interpretation of the codes, if you use phlebotomists, you could lose cases in court. Is that what I am getting here?

I wonder why so many places are using them? I remember bringing this up many moons ago to the alcohol study group and I was looked at like I was crazy.

And the one thing Marty did not explain was who he did use. . . . contract with nurses? Clinical lab scientists (previously clt's)?

For those of you using phlebotomists, how do you rationalize it? we relied on their having guaranteed medical response within 30 minutes and AFN certainly seemed to be gathering contracts.

As you can see, this is a very perplexing problem.

John

From: "Jeff Thompson" <jdmathompson@earthlink.net> **Add to Address Book**

To: "john simms" <tzfan@yahoo.com>

Subject: Re: blood draws – PS

Date: Mon, 22 Mar 1999 21:52:47 -0800

John –

OCSO uses the same people we do on occasion – California Forensic Phlebotomy, & all of their people are med techs, paramedics, LVN, RNs, etc., besides drawing blood for CFP (they are moonlighting for CFP from their real jobs). The head guy is Russ Liedholm ((949) 348-3855), & he is a real strickler [sic] on the rules (for example, I cannot request a blood draw, as the vehicle code gives CFP liability protection if the blood was drawn at the request of a POLICE OFFICER).

Yes, as we did, you could lose the alcohol result on a DUI, if the phlebotomist does not give the correct answer in the court game, but most attorneys are not with it enough to challenge properly. We had someone an outside contract employed a few years ago, & she probably drew 50 samples for us before we figured out she did not meet the std., but we never had any problem in court on her cases.

I can probably dig up the name of the DA that handled out recent case if you want to talk to her directly.

All clear now, right?

Jeff

From: john simms <tzfan@yahoo.com>
To: Jeff Thompson <jdmathompson@earthlink.net>
Subject: Re: blood draws – PS
Date: Monday, March 22, 1999 11:52 AM

Jeff, according to your interpretation of the codes, if you use phlebotomists, you could lose cases in court. Is that what I am getting here?

I wonder why so many places are using them? I remember bringing this up many moons ago to the alcohol study group and I was looked at like I was crazy.

And the one thing Marty did not explain was who he did use. . . . contract with nurses? Clinical lab scientists (previously clt's)?

For those of you using phlebotomists, how do you rationalize it? we relied on their having guaranteed medical response within 30 minutes and AFN certainly seemed to be gathering contracts.

As you can see, this is a very perplexing problem.

John

From: Lough, Patricia
To: Thomas, Shannon
Date: Wed, Jul 25, 2001 3:35 PM
Subject: Phlebotomy Issue

Shannon,

Steve Aronis from the DAs Office (760-806-4118) is pressuring me to get a meeting together ASAP with the Sheriff's Lab Director, the owner of AFN, and whoever I want, to write a legislative change regarding the phlebotomy laws. Specifically he says we must change the CVC to eliminate the reference to the B&P code and allow certificated phlebotomists.

He is adamant that the info I sent to you with the updated B&P 1242.5 (and reference to 1241) does not resolve the issue. He has used that argument in trial and the judge also did not think the issue was resolved. They all feel a change to the CVC is the only way go. He is having many problems in court related to this issue.

His request for this meeting is urgent (he has called me 3 times). Technically the DAs Office and the Sheriff's Lab could go ahead and do this on their own, but they have asked for my help and I would like you to be involved also.

They would like to meet on a Friday morning. Please let me know when you might be available and I will let them know. Or, let me know if you think the B&P revisions are adequate and need no additional changes.

Thanks.

Patricia Lough, Supervising Criminalist
San Diego Police Department
1401 Broadway, MS 725
San Diego, CA 92101
Phone: 619-531-2460 Fax: 619-531-2520
pkl@pd.sannet.gov

CC: Grubb, Michael

From: Lough, Patricia
To: Thomas, Shannon
Date: Thu, Jul 26, 2001 11:04 AM
Subject: Phlebotomy Issue

I have been working with Domingo Aguilar with the DMV about the phlebotomy issue for a couple of months. He has prepared the attached legislative proposal based on our conversation and forwarded his proposal to me which I have attached to this email.

Please review it and let me know what changes you would like to recommend. By working with him we may eliminate the need for us to meet. I faxed a copy of his proposal to DDA Steve Aronis (I don't know his email address).

I have suggested a couple of changes to him. First, labs would probably still contract and pay for phlebotomy services. Second, I had added professional organizational support, i.e., California Association of Criminalists and the California Association of Crime Lab Directors. I need to know from our prosecutors if I can add the CDAA.

At least DMV is on our team!

Patricia Lough, Supervising Criminaiist
San Diego Police Department
1401 Broadway, MS 725
San Diego, CA 92101
Phone: 619-531-2460 Fax: 619-531-2520
pkl@pd.sannet.gov

CC: 'Ronald Barry [E-mail]'

APPENDIX F

OFFICE OF
THE CITY ATTORNEY
CITY OF SAN DIEGO

Casey Gwin
CITY ATTORNEY

[Names And Address Omitted In Printing]

The Office of the City Attorney hereby agrees with Michelle Lee to grant Michelle Lee transactional immunity regarding her employment as a phlebotomist on December 27, 2001, and specifically the blood draw done on Frank Busalacchi. The immunity is given in exchange for Michelle Lee's testimony in *People v. Busalacchi*, case number M852234/WH1147. Michelle Lee agrees to testify truthfully in exchange for this grant of immunity. Michelle Lee understands she has the right to consult with an attorney before signing this agreement. Michelle Lee understands the contents of this agreement and signs it freely. There have been no promises made other than those contained in this agreement.

Dated: June 18, 2002 CASEY GWINN, City Attorney

By /s/ D McDonald
Deanna McDonald
Deputy City Attorney

Dated 6/18, 2002 /s/ Michelle R. Lee
Michelle Lee

OFFICE OF
THE DISTRICT ATTORNEY
COUNTY OF SAN DIEGO

PAUL J. PFINGST
DISTRICT ATTORNEY

[Name And Address Omitted In Printing]

September 5, 2002

Mary Prevost, Esq.
3115 Fourth Avenue
San Diego, CA 92103
(619) 692-9001

Re: People v. Kara Glaser – Case Number C222186

Dear Ms. Prevost:

On September 4, 2002, you requested further discovery, specifically a copy of the written immunity agreement given to "a witness" in this case. Upon research into this matter, I learned that at your Motion to Suppress before Judge Goldsmith on July 30, 2002, you raised the issue that the phleobotomist [sic], Michelle Lee, could be charged with a battery for drawing blood from your client. In response, Deputy District Attorney, Pat Mallen offered Ms. Lee transactional immunity. Ms. Lee was advised and the parties agreed to the transactional immunity agreement. The oral agreement was recorded in the record. Since you were present, you are aware that it was an oral agreement done by the parties in response to your motion. There is not a separate written document regarding the transactional immunity granted in this case. I have enclosed, however, a copy of the language that was used by Deputy District Attorney, Pat Mallen and a copy of the Court Minute Order. The only other guidance I can offer you is to refer you to the Court for a transcript.

Please do not hesitate to contact me immediately, if you have any questions or need further assistance at (619) 441-6636.

Sincerely,

/s/ S. Maria Hannah
S. Maria Hannah
Deputy District Attorney

cc: Court File

APPENDIX G

State of California – Health and Human Services Agency
Department of Health Services

[Logos And Names Omitted In Printing]

January 13, 2004

Mary Frances Prevost
Attorney at Law
3115 Fourth Avenue
San Diego, CA 92103

Dear Ms. Prevost,

Our office has received your requests dated July 13, 2004 and October 27, 2004 for information under the Public Records Act concerning phlebotomy and specifically, actions taken against American Forensic Nurses (AFN) and Faye Battiste-Otto.

Our office sent you a packet of information on August 22, 2003 from complaint file # 2003-038 when we thought AFN was in compliance with the law and the case was closed. However, our office has continued to have complaints about AFN that would indicate they may not be in full compliance, and has opened another complaint investigation (file # 2004-009). We regret that the Department of Health Services (Department) has not completed the current investigation and that information cannot be released at this time. We hope to resolve the matter soon, once and for all, and at that time you may have access to the second file.

You asked for all correspondence, e-mail and/or documents from the Department regarding use of phlebotomists to

draw blood for law enforcement, and those all relate to AFN and cannot be released.

You asked for all correspondence, e-mail and/or documents to and from the Department and the Department of Motor Vehicles, and there has been none. However, there has been such communication between the Department and other law enforcement agencies regarding AFN, but these cannot be released.

You sent a list of employees from University Community Medical Center who contracts to provide phlebotomists to San Diego police agencies. You asked us to provide you with licenses issued by the Department. Our office does not license MLA (medical lab assistants), paramedics, licensed vocational nurses and so cannot provide those. Also we regret that we do not have the staff resources to verify the licenses of all the Clinical Laboratory Scientists on the list that you sent.

You asked for licenses (actually "certificates") issued by the Department to phlebotomists employed by AFN. We do not ask or retain employment information on certified phlebotomists.

You asked the license (certificate) status of three phlebotomists employed by AFN. Martha Orozco was certified by the Department on April 24, 2004. Tony Ramirez, on May 6, 2004 and Sarah Villnave on May 19, 2004.

We hope the AFN investigation will be completed soon and the second file can be accessible to yc I apologize for the delay in responding to you as I have been hoping that this

case would soon be resolved. If you have further questions, don't hesitate to contact me at (510) 873-6360.

Sincerely,

/s/ Karen L. Nickel
Karen L. Nickel, Ph.D.
Chief, Laboratory Field Services
Department of Health Services

Cc Cindy Lloyd
Senior Staff Counsel
Office of Legal Services
Department of Health Services

APPENDIX H

IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

PEOPLE OF THE STATE OF CALIFORNIA, Plaintiffs-Respondents, v. ERIC HANS MATELJAN, et al., Defendants-Appellants.	Case No. _____ Court of Appeal Case Nos. D044282 San Diego County Superior County Case Nos. M872592, M875427, CN148819; CN148673; CN 145324; CN 149604

PETITION FOR REVIEW

TO: THE HONORABLE R. GEORGE, CHIEF JUSTICE, AND TO THE HONORABLE ASSOCIATE JUSTICES OF THE SUPREME COURT OF THE STATE OF CALIFORNIA:

Appellant, Eric Hans Mateljan, and the five other appellants in this consolidated action on appeal, respectfully petition for review in this Court following a published decision of the Court of Appeal, Fourth Appellate District, Division One, filed on May 12, 2005, affirming the orders of the San Diego County Superior Court denying appellants' motions to suppress evidence. Appellants' Petition for Re-Hearing was summarily denied on June 1, 2005. A copy of that denial is attached hereto.

ISSUES PRESENTED FOR REVIEW

The City and County of San Diego, and its public prosecutors, entered into a conspiracy with American

Forensic Nurses (AFN) to deliberately, and systematically violate state law; then conspired with prosecutors to hide these illegal activities, thereby violating the constitutional and civil rights of appellants, and thousands of others who were arrested for suspicion of driving while under the influence of alcohol. The courts in that jurisdiction, including the Fourth District Court of Appeal, condoned these illegal activities by disregarding indisputable evidence put before them, and stubbornly refusing to follow the law as set forth by the United States Supreme Court.

The issues presented for review are:

1. THE WHOLESALE VIOLATION OF FEDERAL, STATE AND LOCAL MEDICAL SAFETY REGULATIONS AND PROTOCOL BY UNQUALIFIED PERSONNEL VIOLATES THE FOURTH AMENDMENT; THE COURT OF APPEAL DID NOT APPLY THE SUBSTANTIAL EVIDENCE TEST.

2. THE DUE PROCESS RIGHTS AND EQUAL PROTECTION RIGHTS OF APPELLANTS HEREIN, AND THOUSANDS BEFORE AND AFTER THEM, WERE VIOLATED WHEN PUBLIC PROSECUTORS AND OFFICIALS WITHHELD EVIDENCE FROM DEFENSE ATTORNEYS.

3. THE INTENTIONAL, WILLFUL AND SYSTEMATIC VIOLATION OF THESE LAWS AND PROTOCOL BY PUBLIC PROSECUTORS WARRANTS SUPPRESSION.

IMPORTANCE OF ISSUES

There is no dispute that the state has a legitimate interest in the enforcement of the DUI statutes. The question, then is this: May the City and County of San

Diego deliberately, and persistently, violate the health and safety laws its legislature has enacted, as well as the constitutional rights of its citizens in order to enforce those laws? Indeed, may prosecutors deliberately conceal the facts surrounding evidence gathering for years in order to obtain criminal convictions through the use of inadmissible evidence? Appellants contend the answer must be a resounding, "No."

Appellants herein were each arrested for suspicion of driving while under the influence of alcohol, in violation of Vehicle Code section 23152, subdivisions (a) and (b). Thereafter, they submitted to a chemical test of their blood alcohol content (BAC) as they were required to do under California's "implied consent law." Appellants' blood was drawn by poorly trained, unsupervised phlebotomists in unsanitary conditions at local police stations. Indeed, the testimony in the trial court revealed that they were never trained in Department of Health standards, or the regulation set forth by OSHA and CalOSHA, or any other federal, state or local health regulatory agency for that matter.

As a result, they re-used contaminated phlebotomy supplies from suspect to suspect, leading to contamination of the samples, and exposing appellants to the risk of pain and infection. These conditions existed solely because the City and County of San Diego employed the services of AFN rather than rely upon the services of medically trained and supervised personnel in licensed hospital facilities.

Evidence adduced at suppression motions that spanned months uncovered that prosecutors and crime laboratory personnel knew that this behavior was occurring, but

suppressed that information for years from the defense because allowing the unlawful criminal behavior to continue unchanged saved money for the city and county and ensured convictions. In fact, city and county prosecutors went so far as to provide defense attorneys discovery identifying each blood drawer as a "nurse" when he/she was not at all a nurse.

Nearly 40 years ago, the United States Supreme Court announced in *Schmerber v. California* (1966) 384 U.S. 737, that while the state may collect a drunk driving suspect's blood with or without his or her consent owing to the exigency of the circumstances, the collection fo [sic] that blood must be conducted in a "medically-approved manner" to satisfy the Fourth Amendment. Clearly, the blood draws in the present case were not done in a "medically-approved manner," and thus, appellants' Fourth Amendment rights were violated as a result thereof.

The violation of a substantive right, *e.g.*, the right to be free from unreasonable search and seizure, constitutes a violation of the right to equal protection of the law under a strict scrutiny standard. (*Nordinger v. Hahn* (1992) 505 U.S. 1, 10.) As a result of this clear violation of their constitutional rights under the Fourth Amendment, appellants were denied their right to equal protection under the law.

Indeed, not only were appellants subjected to a clear violation of their Fourth Amendment rights, they were denied due process of the law when prosecutors conspired with law enforcement, including laboratory personnel, to hide the information regarding these unlawful blood draws from appellants and their counsel.

For at least five years, the City and county of San Diego deliberately and persistently violated the constitutional rights of literally thousands of citizens who were arrested for suspicion of driving while under the influence of alcohol. Although [former] Vehicle Code section 23158 specifically excluded phlebotomists from drawing the blood of a suspected drunk driver without direct supervision, and in conformity with the California Code of Regulations, Title 17, the City and County of San Diego, and its public prosecutors, conspired with AFN to facilitate these unlawful blood draws.

Moreover, the record in here is replete with internal memoranda uncovered by the defense outside the criminal discovery arena which revealed that prosecutors and crime laboratory personnel knew of these illegal practices and went to great lengths to conceal them from appellants and their attorneys in violation of the Sixth Amendment and *Brady v. Maryland* (1963) 373 U.S. 83, thereby denying appellants their due process right to a full and fair hearing upon the charges brought against them.

The Fourth Amendment to the United States Constitution provides that no person shall be subjected to an "unreasonable search and seizure." The Fourteenth Amendment provides that no person shall be deprived of life, liberty, or property without the "due process of law." The City and County of San Diego have, over a period of several years, deliberately and systematically deprived appellants, and thousands of other citizens of the right to be free from unreasonable searches through illegal blood draws by untrained, unqualified phlebotomists who conducted these blood draws under medically unsafe conditions. Yet, the courts, ignoring both the evidence and the law, refused to put a stop to this outrage.

Instead, the courts in that jurisdiction upheld and condoned these unlawful searches. It's fair to say, of course, that until appellants herein uncovered the truth of these illegally conducted searches, the courts in general were kept as much in the dark by prosecutors as were the defendants and their counsel. Thus, one would think the trial courts would act, having learned the truth of the matter, however the [sic] did not.

It is incomprehensible of course, that once the truth was put before them, the trial courts simply turned a blind eye, and refused to impose the sanction of suppression against prosecutors for their gross misconduct in hiding evidence which clearly met the Brady standard, *i.e.*, evidence which is either exculpatory to the defendant, or can be used to impeach the prosecution's witnesses.

Even more disturbing, however, is the appellate court's refusal to uphold the law in this regard. The Fourth District Court of Appeal, in the matter at hand, was presented with an abundant record containing incontrovertible evidence that the blood draws were conducted in violation of the Fourth Amendment, and further, that prosecutors had conspired with a contract phlebotomy agency and law enforcement to conceal this evidence from appellants and their counsel. When defense attorneys found out of the subterfuge, prosecutors granted their blood drawers immunity! Indeed, the justices thoroughly chastised these prosecutors during oral argument for such conduct. Yet, the appellate court ignored the evidence presented, and concluded that there was no "*Brady* violation" because there was really no Fourth Amendment violation. (*People v. Mateljan* (2005) 129 Cal.App.4th 367, 376.)

Clear in *People v. Esayian* (2003) 112 Cal.App.4th 1031, and *People v. McHugh* (2004) 119 Cal.App.4th 202, the court of Appeal did not have before it the immense record of the breadth of prosecutorial misconduct was not entirely known. Nonetheless, in response to these decisions, and the lobbying efforts of San Diego prosecutors, the legislature has now amended Vehicle Code section 23158 to allow phlebotomists to draw DUI suspects' blood without any supervision whatsoever. The court of Appeal, in part, hung its hat on this change in law when denying appellants' motion.

Deputy District Attorney Laura Tanney, one of the prosecutors in the trial and appellate court cases herein, lobbied the legislature to change the law to allow unsupervised phlebotomists to draw blood.[1] We suspect Ms. Tanney was no more forthright with the legislature about the filthy conditions and practices used in drawing blood than she was the defense attorneys. It is abundantly reasonable to believe that Ms. Tanney did not inform the legislators she contacted that: (1) she had given immunity to phlebotomists for their criminal acts when defense attorneys found out about the unlawful activities; and, (2) the phlebotomists she now wanted to be legally unsupervised violated every health policy they were questioned about.

But she sought a subsequent remedial measure to make the past misconduct of city and county prosecutors more palatable to future courts. But her success is a meager prophylactic band-aid to cover up the history of

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[1] Ms. Tanney was one of the prosecutors who denied that her office withheld relevant evidence at the trial level and insisted to Court of Appeal panel when challenged on this issue, that this was **not** a violation of *Brady*.

the prosecutors' unlawful conduct. And the Court of Appeal, in part, hung once more its hat on this.

The wound still festers underneath the band-aid because AFN to this day is still violating the law. In May 2003, the Department of Health Services issued a statewide cease and desist order against AFN base on defense counsel's investigation. The Department of Health Services has, since the new law went into effect, opened **two** new investigations into AFN's continuing violations of the law. And, as far as we know, nothing has changed as far as the filthy conditions of the jail and the filthy procedures employed by phlebotomists.

So, while it is beyond dispute that unsupervised, unqualified phlebotomists, drawing blood in the filthy conditions present in the local police states does not satisfy the "medically-approved" standard set forth in *Schmerber*, the Court of Appeal has chosen to ignore the law handed down by the United States Supreme court and set new standards which allow prosecutors to obtain criminal convictions through the use of illegally obtained evidence. This Court should therefore grant review to address the obvious constitutional violations present here. If not, *Schmerber* is dead in this land.

THE FACTS

[F]ormer Vehicle Code section 23158 specifically set forth the personnel who were authorized to draw the blood of those suspected of driving while under the influence of alcohol. California Code of Regulations, Title 17, set forth the medically-approved method for such blood draws. These statutes were specifically enacted in 1966 in response to the United States Supreme Court's

landmark decision in *Schmerber v. California, supra*, 384 U.S. 737.

The High court recognized that any intrusion in the body of an individual constituted a search, and that the protections fo [sic] the Fourth Amendment apply under such circumstances. The *Schmerber* Court was very clear on the issue:

> It bears repeating, however, that we reach this judgment only on the basis of acts of the present record . . . that we today old [sic] that the constitution does not forbid the states minor intrusions into an individual's body under stringently limited conditions in no way indicates that it permits more substantial intrusions, or intrusions under other conditions. (*Schmerber*, at p. 772 [emphasis added].)

The Court continued:

> We are thus not presented with the serious questions which would arise if a search involving use of a medial technique, even of the most rudimentary sort, were made by other than medical personnel or in other than a medial [sic] environment – for example, if it were administered by police in the privacy of the station house. To tolerate searches under these conditions might be to invite an unjustified element of personal risk of infection and pain. Ibid.

But the City and County of San Diego employed AFN to conduct blood draws under extremely unsanitary conditions, using phlebotomists who had little training and no supervision.

In its summary of the facts, the appellate court stated that "all of the phlebotomists used by AFN had received

post-secondary training as medical assistants, including instruction in phlebotomy. Each of the phlebotomists testified as to their training and experience and the procedures they used in drawing the appellants' blood. The city also offered the testimony of a registered nurse, Alice Cresci, who testified that the phlebotomists performed the blood draws in a medically appropriate manner. Her testimony was supported by the testimony of Dr. Leland Rickman, a UCSD physician who specializes in infectious diseases." (*People v. Mateljan, supra*, 129 Cal.App.4th at p. 372.)

In fact, the record amply showed that most of AFN's phlebotomists had far less than the educational training required to meet state standards. For example, AFN phlebotomist Stacy Walker took a two-month phlebotomy class and her certificate" stated that she had only 10 hours of phlebotomy training in 1998. (MRT 471.)[2] In September 2002, she was no longer allowed to draw blood owing to her lack of credentials. (MRT 413.) Prior to her termination from AFN, she had completed 50-60 legally unauthorized blood draws per month for AFN. (MRT 413.)

Another phlebotomist, Michelle Lee, went to Kelsey-Jenny Business College in 1994, then took a "refresher course" at Boston Reed Company for 16 hours several years later. She only had to do three sticks to pass. (MRT 2730275.) AFN phlebotomist Stephanie Rider received 16 hours of phlebotomy training in San Diego for which she

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[2] The citations herein are to the original record on file in the Court of Appeal. "MRT" refers to "Mateljian Record transcript" and "DRT" refers to Davari/Fanale Record transcript. The issues were more fully briefed therein.

needed 10 sticks in order to get a certificate. (MRT 555-557.)

These are just a few examples of AFN's phlebotomists who had no post-secondary training regarding blood draws, contrary to the misstatement of "fact" by the appellate court.

As to the testimony of prosecution witness Alice Cresci that "the phlebotomists performed the blood draws in a medically-appropriate manner," it should be noted that Ms. Cresci was employed by Pomerado Hospital. (MRT 985.) Ms. Cresci testified that she reused vacutaner tube holders at Pomerado Hospital in violation of OSHA and CalOSHA requirements up until the week before her testimony at the hearing in the trial court. (MRT 1132.) Additionally, Ms. Cresci revealed that she had no knowledge of the OSHA requirements for blood draws and the protocol as to the use of vacutaner tube holders. (MRT 951-954).) Notwithstanding her ignorance of the safety protocol, she was allowed to testify as an "expert." The Court of Appeal did not take into consideration her deficiencies in knowledge of medical protocol when relying on her assessments.

Ms. Cresci's supervisor, Ted Drescher, testified for the defense. He is the phlebotomy manager at Pomerado Hospital. Mr. Drescher testified, *inter alia*, State Health regulations require that one must throw away anything that touches the patient, including the vacutaner tube holder, and that this is a Hospital-wide policy which is strictly adhered to at Pomerado Hospital.[3] (MRT

[3] This, of course, calls into question Ms. Cresci's entire testimony.

1142-1143.) "Expert" Cresci clearly violated these rules set out to ensure the safety of patients.

Kim Dominguez, a supervising phlebotomist at AFN, testified that AFN has no rules, procedures, or protocols regarding the storage of supplies given out to phlebotomists. (MRT 189.) She further testified that she does not clean the area where the blood draws take place in between blood draws. (MRT 161-162.)

There was also ample evidence presented through the testimony of AFN employees, and former employees, during the evidentiary hearing in the trial court, that the AFN phlebotomists stored their kits in unsanitary conditions at their homes, seldom cleaned their supplies, and kept their supplies in tackles boxes bought at discount stores. These supplies were stored in dusty residential garages, under sinks with the household cleans, in closets, and in trunks of cars. Additionally, the phlebotomists never took medical histories from the individuals before they drew their blood, and never monitored them after the blood draw, clear violations of Business and Professions Code section 23612(5)(B) and (C).

Testimony at the evidentiary hearings in the trial courts revealed that forced blood draws took place in the sally port at the jail where there were sometimes several vehicles with engines running in the sally port, and that the chairs where suspects were seated for these blood draws were never sanitized. (MRT 181-183.) According to the testimony of AFN supervising phlebotomist Kim Dominguez, at the police station, blood draws are done in a big room where many individuals go in and out all the time. (MRT 30, 27.) If there was a medical crisis in the jail, there is no one present to assist, and officers must call 911.

(MRT 204.) This leads to the obvious conclusion that the AFN phlebotomists were never supervised as required by Vehicle Code section 23158, and DHS regulations, when the [sic] drew blood at the jail.

Dr. Alan Rickman, while attempting to support the prosecution's insistence that AFN phlebotomists posed no heath risk to those whose blood they drew, had to admit under cross examination that:

1) Storing vacutaner tubes at low or high temperatures could destroy the integrity of the powder and affect the results of the tests;

2) There is a risk of transmission of pathogens to a patient by reuse of blood tube holders;

3) In non-emergency situations, it is not proper to have violations of protocol;

4) Any time there is an invasive procedure such as breaking skin for a blood draw, there is a risk of infection; and,

5) One of the main considerations for using reasonable medical techniques is to obtain a valid sample. (MRT 1316-1361.)

According to Les Revier, the chief of quality assurance at UCSD clinical laboratories, a California Department of health Services licensed and accredited laboratory, the AFN phlebotomists failed to follow almost all of the medically-approved standards set forth in OSHA, CalOSHA, and DHS regulations. (MRT 1162-1239.) It is not accepted medical practice to re-use vacutaner tube holder from patient to patient and only dispose of them when there is visible contamination. (MRT. 1203-1204.) In

cases of emergency, such as a bio-terrorist incident, rules and procedures may be suspended. But, Mr. Revier states, **"I can't imagine having a phlebotomy station in a garage."** (DRT 1205.)

OSHA standards protect the patient. (MRT 1169.) The purpose of the procedure with regard to vacutaner tube holders is to prevent contamination. It used to be that those were taken apart and re-used. **That would be "unheard of" today.** (DRT 1171.)

In preparation for his testimony, Mr. Revier discussed a New York Times article outlining an outbreak of aggressive and painful skin bacteria resistant to antibiotics was appearing in San Francisco and Los Angeles County jails. According to the article, there were more than 1,000 outbreaks in one year. He also found reference to this outbreak in *The Medical Laboratory Observer* which noted it because the bacteria in the jails was also a type of bacteria found in hospitals and it "is starting to become a big topic in the community." (DRT 1225-1229.)

At the hearing brought by appellants who had been arrested in the County of San Diego, most of the same evidence and testimony was presented. Additionally, Dr. Robin testified for the prosecution. According to Dr. Robin, it is a necessity at his hospital that a medical history be taken before a blood draw. Other than in emergency situations, it is not accepted medical practice for physicians giving a blood draw to do so without first having reviewed medical history.

He said medical supplies must be stored properly to ensure the integrity of samples, and it is absolutely mandatory that hands are washed.

He wrote a textbook on transmission of infection in drug users, but that is diametrically opposed to what happens in phlebotomy because "in phlebotomy we take all precautions necessary to prevent infections."

He opined that:

1) If protocol for a procedure is in force, it is not medically-approved not to use it;

2) He follows specific protocol at the hospital for protection of patients and staff;

3) Protocols "ascertain the minimum requirements of procedures and policies as affects – as affect the patients and hospital employees";

4) If one falls below the basic, minimum standards, the hospital could be shut down;

5) It is not medically accepted in the medical community to have protocol and not disseminate it to employees. One must at least follow minium [sic] requirements set out by regulatory agencies;

6) If the minimum requirements outlined by regulatory agencies are not followed, there could be danger to the patient;

7) Hand washing is the single most important procedure for preventing infection;

8) The phlebotomists at his hospital are "thoroughly and rigorously trained on didactic and written materials" and "we observe them and we track them and follow them carefully." (DRT 1360-1367.)

He was unaware of OSHA and CalOSHA regulations precluding the reuse of vacutaner tube holders.[4] He has never visited any of the jails where the blood draws took place. However, he opined that he was not concerned that the phlebotomists in these condition, unlike in his hospital, didn't wash hands regularly, stored phlebotomy supplied in extreme temperatures outside manufacturer's guidelines, and followed no protocol.

While a failure to follow protocol can cause serious risk of danger to patients at his hospital, Dr. Robin was unconcerned with the AFN phlebotomists' wholesale ignorance of any federal, state or local protocol.

Even though protocols are in place to protect the patient, and his hospital would be shut down if he failed to follow regulations and protocol, Dr. Robin was not concerned that these regulations which set out the basic, minimum standards medical personnel cannot fall below, were never even reached by AFN personnel, much less surpassed.

Essentially, Dr. Robin testified that it was medically acceptable for the prosecution's phlebotomists to violate all of the health and safety regulations and protocols that would cause his hospital to be shut down for falling below the standard of care in the community.

In short, DUI suspects are not entitled to protection of health codes and regulations. But his patients and all other citizens, are. He essentially testified that a double standard exists wherein DUI suspects are not entitled to

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[4] Calling into question, of course, the value of his testimony.

the protections of even the most basic health and safety protocol to which every single other citizen is entitled.

Finally, the North County trial court declined to allow the doctor to answer the following question which counsel proffered went to the issue of *Winston v. Lee*: "If two procedures could give the same result, one of which is harmless, and one of which might present some harm, wouldn't one choose the procedure that had no possible contraindications?" The defense position was that there was a perfectly safe breath test to be had in lieu of subjecting suspects to such dangerous blood draws.

The Court said, "The answer is obvious. One always chooses the lesser of two evils."

The trial court also disallowed cross-examination that defense counsel had uncovered that the doctor had lost a malpractice suit for misdiagnosing HIV – one of his claimed specialties – and that he had been sued for misdiagnosing the former San Diego Sheriff's Department crime lab supervisor. The prosecutor had not provided this impeachment evidence to the defense when they provided a witness list.

I. THE WHOLESALE VIOLATION OF FEDERAL, STATE AND LOCAL MEDICAL SAFETY REGULATIONS AND PROTOCOL BY UNQUALIFIED PERSONNEL VIOLATES THE FOURTH AMENDMENT; THE COURT OF APPEAL DID NOT APPLY THE SUBSTANTIAL EVIDENCE TEST.

On appeal from the denial of a motion to suppress evidence on Fourth Amendment grounds, the appellate court reviews the historical facts as determined by the trial court under the "substantial evidence" standard of

review. Once historical facts underlying the motion have been determined, the court reviews those facts and applies the de novo standard of review in determining their consequences. Although appellate court [sic] give deference to the trial court's factual determinations, the reviewing court must independently decide the legal effect of such determinations. (*People v. Ramos* (2004) 34 Cal.4th 494, 505).

We begin with *Schmerber v. California* (1966) 384 U.S. 757. Almost 40 years ago the high court recognized that the taking of a blood sample for driving under the influence (DUI) constitutes a seizure within the meaning of the Fourth Amendment and observed that "the overriding function of the Fourth Amendment is to protect personal privacy and dignity against unwarranted intrusion by the State." (*Schmerber, supra*, at p. 767) Accordingly, the Supreme Court set limitations on the circumstances under which the police, acting without a warrant, could seize blood from an arrestee.

Specifically, the Supreme Court held that, in the forced blood draw setting, such a seizure could be lawful only if the officer ordering the blood sample reasonably believed he was confronted with an emergency in that the delay caused by obtaining a warrant would result in the destruction of evidence, the office had probable cause to believe the suspect had been driving under the influence, and the procedures used to extract the blood were reasonable and medically approved. (*Schmerber, supra*, at pp. 770-772).

It is well held that where a search involves a surgical intrusion beneath the skin, its reasonableness depends in part on "the extend [sic] to which the procedure may

threaten the safety or health of the individual." (*Winston v. Lee* (1985) 470 U.S. 753, 761-762)

Some 29 years after *Schmerber* was decided, the federal courts still struggled with the meaning of what was "medically acceptable." To address the issue of taking blood samples in a "reasonable manner" it was stated in *United States v. Chapel* (9th Cir. 1995) 55 F.3d 1416, "We have defined 'reasonable' in the context of blood draws to mean that "the sample must be taken by trained medical personnel in accordance with accepted practices."

Expanding on the never-ending advances in medicine and never-ending identification of infectious diseases found by research, the court in *Nelson v. City of Irvine*, 143 F.3d 1196 (9th Cir. 1998), likewise acknowledged the risks: **"[M]edical science now teaches us that special precautions should be employed in procedures involving exposure to bodily fluids."** (*Id.* at 1201)[5] [emphasis added].

In 1966 the State of California responded to the arguments in *Schmerber* by enacting Vehicle Code section 23158(a). It established a baseline, minimum standard in our community, authorizing only certain licensed, state qualified individuals to perform a medical procedure which intruded into the Fourth Amendment rights of criminal suspects. Falling below that standard of care of

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[5] The court cited Centers for Disease Control, U.S. Department of Health and Human Services, Guidelines for Prevention of Transmission of Human Immunodeficiency and Hepatitis B Virus to Health-Care and Public Safety Workers, 17-18 (1989) ("Blood from **all** individuals should be considered infective," and the "use of needles and syringes should be limited to situations where there is no alternative").

the community subjects suspects to unjustifiable risk of pain and infection.

Simultaneously, the legislature also enacted then section 13343 (subsequently renumbered section 23612). Hemophiliacs and individuals with taking anti-coagulants were exempt from taking blood tests. Today, section 23612(5)(B) and (C) maintains those exemptions.

As shown *ante*, there was an abundance of evidence presented at the hearing on appellants' suppression motions in the trial court which supported their claim that the taking of their blood by phlebotomists under the above-described conditions violated their Fourth Amendment rights pursuant to the holding in *Schmerber*. In fact, there was practically **no evidence** that could possibly lead a reasonable person to believe that AFN phlebotomists drew blood for chemical testing in a medically-approved manner.[6]

Unlicensed, unqualified phlebotomists, masquerading as "nurses" with permission from public prosecutors, reused medical supplies from patient to patient and, essentially, violated every single federal, state and local protocol enacted to ensure safety of patients.

What became crystal clear during the pendency of these lengthy suppression motions, was that prosecutors asked the local courts, and then the appellate court, to create a double standard where nice, law-abiding citizens should [*sic*] entitled to the regulatory protections enacted

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[6] These Fourth Amendment issues are fully and completely briefed in both Appellants' Opening Briefs in the Mateljian and Davari cases, and will not be reiterated here.

for the safety of patients, while those safe health and safety regulations should be suspended for suspects in DUI. Their reasoning? It was cheap.

Consistently in the cases of *People v. Esayian, supra,* and *People v. McHugh, supra,* The Court of Appeal dodged the heavy burden of having to sanction prosecutors engaged in the systematic and persistent violations of the law. The Court of appeal in both cases – neither of which included records rife with the evidence of sickening medical practices that was adduced here[7] – hid behind its mantra that violation of a state statute does not warrant suppression.

Of note should be the Court of Appeals' consistent and improper reliance on *People v. McKay* (2002) 27 Cal.4th 601, 607-619), for the proposition that the violation of Vehicle Code section 23158(a) does not warrant suppression. (*Mateljian, supra,* at p. 374)

As shown in the briefing of both the *Mateljian* and *Davari* cases, Vehicle Code section 23158(a) is not just some statute. It is a statute enacted as part of the "implied consent" law and in direct response to the United States Supreme Court's holding in *Schmerber, supra.* As such, Proposition 8 did not preclude suppression based on this state statute, **since it's enactment was based on complying with the Fourth Amendment principles set out in *Schmerber.*** (*See, Davari* AOB, p. 18-20; *Mateljian* AOB, p. 19-26). In support of this, the legislature has declared it is a **"direct threat to the health and safety of the people of the state of California to**

[7] Because, of course, prosecutors were still hiding the *Brady* evidence.

engage in unlicensed activity." (Business & Professions Code section 1285). Vehicle Code sec. 23158(a) is co-extensive with the Fourth Amendment.

But even so, and taking out of the mix the status of the phlebotomists themselves, and the fact that they were pawned off to defense attorneys for years as "nurses", the complete and utter disregard for all federal, state and local health and safety procedures posed a serious risk to these citizens herein, a risk that would never be sanctioned if it occurred in a doctor's office, or in a clinic, or in a hospital, or in a nursing home.

Justice McIntyre sat on the appellate panel in the Esayian case. He saw the writing on the wall and disagreed with the majority.[8] He believed suppression based on such misconduct was appropriate. He was removed from the panel who heard the instant case. This was his opinion of the law and how it should be applied to the malfeasance of the government:

> The United States Supreme Court has stated that the exclusionary rule is a judicially created remedy designed to deter law enforcement misconduct by prohibiting the admission of evidence obtained in violation of the Fourth Amendment. (*Arizona v. Evans* (1995) 514 U.S. 1, 10 [131

[8] The omission of this justice from the panel was noted in counsel's Motion to Recuse Justice Huffman. Appellants request this tribunal to carefully read that application, which is part of the record herein, particularly Ex. E attached thereto, wherein United Stated [sic] District Court Judge William Hayes declined to dismiss a Fourth Amendment claim in a federal sec. 1983 suit because if the facts pleaded about AFN, City and County could be proved, a viable claim under *Schmerber* **exists.** This federal court applying federal law to the exact facts herein came to an entirely different conclusion.

> L. Ed. 2d 34, 115 S. Ct. 1185].) The purpose of the rule is not to cure the constitutional violation, which is already fully accomplished by the illegal search itself, but instead to effectuate the Fourth Amendment's guarantee against unreasonable searches or seizures by deterring future unlawful police conduct. (*Ibid.*) Based on this purpose, the application of the rule is restricted to situations in which the rule's remedial purpose is "effectively advanced," which in turn depends on "the source of the error or misconduct that led to the unconstitutional search and whether, in light of that source, the deterrent effect of exclusion is sufficient to warrant that sanction." (*People v. Willis* (2002) 28 Cal.4th 22, 29-30, [120 Cal. Rptr. 2d 105, 46 P.3d 898]) (*People v. Esayian* (2003) 112 Cal.App.4th 1031, 1047 (dissenting opn. McIntyre)).

Nonetheless, the new appellate court panel, absent the voice of Justice McIntyre, upheld the upheld [sic] the trial courts' denial of appellants' motions to suppress the evidence in their consolidated cases. Appellants contend that it is necessary for this Court to review the appellate court's findings in this regard. Appellants were entitled to the suppression of evidence illegally seized in their criminal cases, and this Court should act to correct its decision, since it was not founded in "substantial evidence."

II. THE DUE PROCESS AND EQUAL PROTECTION RIGHTS OF APPELLANTS HEREIN, AND THOUSANDS BEFORE AND AFTER THEM, WERE VIOLATED WHEN PUBLIC PROSECUTORS AND OFFICIALS WITHHELD EVIDENCE FROM DEFENSE ATTORNEYS.

Here, the appellate court opined that equal protection must be applied only to "a claim of discriminatory

enforcement," citing *Baluyut v. Superior Court* (1996) 12 Cal.4th 826. (*Mateljian, supra*, at p. 376). But "discriminatory prosecution" is not necessary to a claim for a violation of an individual's right to equal protection of the law. No "suspect" class is necessary where a **substance right** has been violated. In addressing an equal protection claim, a standard of strict scrutiny is applied.

California has followed the two-tier approach employed by the United States Supreme Court in reviewing legislative classifications under the equal protection clause. (*Rittenband v. Cory* (1984) 159 Cal.App.3d 410, 417-418.) Under that approach, a strict scrutiny test is applied in cases involving suspect classifications **or** fundamental interests; the rational basis test applies in all other cases. (*Ibid.*) A fundamental interest for strict scrutiny purposes means a fundamental **constitutional** right. (*See* 8 Witkin, Summary of Cal. Law (9th ed. 1988) Constitutional Law, section 602, pp. 55-56.)

In the present case, of course, that constitutional right is the right to be free from "unreasonable search and seizure."

In his dissenting opinion in *Esayian*, Justice McIntyre joined that the prosecutor did not present any evidence as to the safety and sanitation conditions at the detention facility and whether those conditions would comply with the standards applicable to medical facilities. Thus, the prosecutor did not meet its burden of proof to establish the reasonableness of the blood draw for Fourth Amendment purposes. (*See, People v. Jenkins* (2000) 22 Cal.4th 900, 972 [citations omitted]; *see also, United States c.* [sic] *Matlock* (1974) 415 U.S. 164, 171, 177 [citations omitted])" (*Esayian* at p. 1046).

This is so in the present case. Not only did the prosecution utterly fail to prove that the blood draws in question were obtained in a medically-approved manner, appellants show that, to the contrary, they were **not**.

If a regulation affects a certain group of people and a **substantial right** is implicated, the *burden is on the government to show the law is necessary to achieve a compelling government purpose*. The concept of personal privacy is implicit in the concept of "liberty" within the protection of the Due Process Clause; *i.e.*, it is one of those most basic human rights which are of "fundamental" importance in our society. (*Roe v. Wade* (1973) 410 U.S. 113.)

Making money, keeping money, or saving money for a private company is not a "compelling state interest." That, according to Faye Battiste Otto, owner of AFN, is the reason why she did not supply nurses, and the reason why prosecutors hid their malfeasance all these years. Nor is the need for speed a valid basis for violating Equal Protection. (*Bush v. Gore* (2000) 531 U.S. 98.

The violations of Due Process are even easier to grasp. Prosecutors never told these, or any other defense attorneys, that the people they were passing off as "nurses" were storing their phlebotomy supplies and chemical tubes in steamy car trunks in the summer heat, thereby destroying the integrity of any blood sample that might subsequently be placed in them.

Dr. Rickman, Dr. Robin and Les Revier **all agreed**: storing blood tubes in extreme conditions can destroy the integrity of the sample. No one disputed this. They all said so, they all agreed. And the phlebotomists stored their supplies in laundry rooms, garages and car trunks, thus

destroying the integrity of any samples that may later have been placed in them.

And the prosecutors knew. Defense attorneys across the board didn't, and were precluded from cross examining witnesses to attack the integrity of the sample.

We wonder what else is out there that is hidden in the bowels of the crime labs and prosecutors offices in San Diego? Whatever scurrilous conduct was uncovered by the defense, it was done through means independent of the criminal discovery scheme.. What have they hidden that we don't know about? We suspect it is great. But we will never know, and prosecutors continue to get a "pass" notwithstanding the scurrilous behavior they have engaged in thus far across the board.

III. THE DELIBERATE AND PERSISTENT VIOLATION OF STATE LAW HAD BEEN PROVED AND THE BLOOD DRAWS WERE NOT CONDUCTED IN A MEDICALLY-APPROVED MANNER.

In *People v. Esayian*, *supra*, 112 Cal.App.4th 1031, the majority of the appellate court held that a careful review of the record, including matters judicially noticed by the court, did not establish a systematic and persistent policy by the county to violate the statutory scheme for drawing blood in DUI cases. The Court also held that the mere fact that the phlebotomist "may not have fully complied with the statutory requirements of Vehicle Code section 23158," did not make the procedure a violation of the Fourth Amendment. The constitutional question was, rather, **whether the blood was drawn in a medically-approved permissible manner.** (*Ibid* at p. 1035 [emphasis added].)

In *Esayian*, however, the court did not have the facts it had in the record on appeal here.[9] The Mateljian court had the benefit of the abundant record created below in the trial court wherein the facts are clear – not only did the City and County **deliberately and persistently** violate state law by using unqualified, unsupervised phlebotomists to obtain blood samples, (Veh. Code sec. 23158), **these individuals conducted the blood draws in the most unsanitary manner and conditions imaginable.** In other words, they were **not** blood draws conducted n [sic] a "medically-approved manner" and thus, these blood draws clearly violated the Fourth Amendment.

This *Mateljian* Court indeed recognized there was a systematic and persistent policy by the city and county to violate the statutory scheme for drawing blood in DUI cases. (*Mateljian*, *supra*, at p. 376).

In *In re Garringer* (1987) 188 Cal.App.3d 1149, the court held that a systematic, persistent and deliberate policy of the non-advisement by police officers in compliance with the "Implied Consent" law, would give rise to a claim for violation of Due Process and Equal Protection. Here is a portion of the Deputy City Attorney's dialogue with the court. As one can see, Justice Haller had to finally pin down the prosecutor to get her to admit that the evidence withheld from defense attorneys should have been given over:

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[9] This is so, of course, because San Diego City and County prosecutors his [sic] the information necessary to such findings.

J. HALLER	Speaking theoretically, would a prosecutor be required to advise defense counsel that blood was taken by someone who was not authorized by statute? Is that exculpatory?
DCA TIANA	**I would say no.**
J. HALLER	And why is that?
DCA TIANA	Because it does not violate any constitutional right and, uh, the blood draws were performed in (inaudible) . . .
J. HALLER	(Interjecting) **Is it material exculpatory information under *Brady* the fact that someone not authorized . . .**
DCA TIANA	I don't believe it would allow her to win a suppression motion, and it certainly . . .
J. HUFFMAN	Would it be evidence relevant to the credibility of the taker of the test and the gatherer of the results? Is it not – is there no tendency in reason to believe that a person who does not – is not "qualified" under state statute to do a job might be viewed by trier of fact less credibly than a person who was "qualified?"
DCA TIANA	Well, I think that based on the evidence that did come out in the suppression motion, I think that we show that they were qualified and skilled . . .

J. HALLER	**Actually you know we're passing in the night here. Let's get – the question really relates to this: Does a prosecutor who knows that the person taking the blood draw is not authorized to do so, is that information, that is, exculpatory that needs to be turned over, so that when we're in trial, the defense attorney has a chance to say to the jury, "Oh, by the way, folks, this person isn't authorized," and then to cross-examine that person on what their particular procedure was on that evening?**
DCA TIANA	**Yes.**

The Court chastized [sic] Deputy District Attorney Laura Tanney even more harshly. DDA Tanney stuck to her guns, arguing with the Court that all of the massive evidence withheld by the prosecution didn't amount to *Brady*.

DDA TANNEY	**It's our position that this is not *Brady* information.** Counsel or appellant cannot come up with a theory for something may be exculpatory without any precedent for it and then attempt to argue that that has exculpatory value, when there's absolutely no evidence there is any exculpatory value . . .

I wonder why so many places are using them? I remember bringing this up many moons ago to the alcohol study group and I was looked at like I was crazy.

And the one thing Marty did not explain was who he did use.... contract with nurses? Clinical lab scientists (previously clt's)?

For those of you using phlebotomists, how do you rationalize it? we relied on their having guaranteed medical response within 30 minutes and AFN certainly seemed to be gathering contracts.

As you can see, this is a very perplexing problem.

John

From: "Jeff Thompson" <jdmathompson@earthlink.net> **Add to Address Book**

To: "john simms" <tzfan@yahoo.com>

Subject: Re: blood draws – PS

Date: Mon, 22 Mar 1999 21:52:47 -0800

John –

OCSO uses the same people we do on occasion – California Forensic Phlebotomy, & all of their people are med techs, paramedics, LVN, RNs, etc., besides drawing blood for CFP (they are moonlighting for CFP from their real jobs). The head guy is Russ Liedholm ((949) 348-3855), & he is a real strickler [sic] on the rules (for example, I cannot request a blood draw, as the vehicle code gives CFP liability protection if the blood was drawn at the request of a POLICE OFFICER).

Yes, as we did, you could lose the alcohol result on a DUI, if the phlebotomist does not give the correct answer in the court game, but most attorneys are not with it enough to challenge properly. We had someone an outside contract employed a few years ago, & she probably drew 50 samples for us before we figured out she did not meet the std., but we never had any problem in court on her cases.

I can probably dig up the name of the DA that handled out recent case if you want to talk to her directly.

All clear now, right?

Jeff

From: john simms <tsfan@yahoo.com>
To: Jeff Thompson <jdmathompson@earthlink.net>
Subject: Re: blood draws – PS
Date: Monday, March 22, 1999 11:52 AM

Jeff, according to your interpretation of the codes, if you use phlebotomists, you could lose cases in court. Is that what I am getting here?

I wonder why so many places are using them? I remember bringing this up many moons ago to the alcohol study group and I was looked at like I was crazy.

And the one thing Marty did not explain was who he did use. . . . contract with nurses? Clinical lab scientists (previously clt's)?

For those of you using phlebotomists, how do you rationalize it? we relied on their having guaranteed medical response within 30 minutes and AFN certainly seemed to be gathering contracts.

As you can see, this is a very perplexing problem.

John

From: Lough, Patricia
To: Thomas, Shannon
Date: Wed, Jul 25, 2001 3:35 PM
Subject: Phlebotomy Issue

Shannon,

Steve Aronis from the DAs Office (760-806-4118) is pressuring me to get a meeting together ASAP with the Sheriff's Lab Director, the owner of AFN, and whoever I want, to write a legislative change regarding the phlebotomy laws. Specifically he says we must change the CVC to eliminate the reference to the B&P code and allow certificated phlebotomists.

He is adamant that the info I sent to you with the updated B&P 1242.5 (and reference to 1241) does not resolve the issue. He has used that argument in trial and the judge also did not think the issue was resolved. They all feel a change to the CVC is the only way go. He is having many problems in court related to this issue.

His request for this meeting is urgent (he has called me 3 times). Technically the DAs Office and the Sheriff's Lab could go ahead and do this on their own, but they have asked for my help and I would like you to be involved also.

They would like to meet on a Friday morning. Please let me know when you might be available and I will let them know. Or, let me know if you think the B&P revisions are adequate and need no additional changes.

Thanks.

Patricia Lough, Supervising Criminalist
San Diego Police Department
1401 Broadway, MS 725
San Diego, CA 92101
Phone: 619-531-2460 Fax: 619-531-2520
pkl@pd.sannet.gov

CC: Grubb, Michael

From: Lough, Patricia
To: Thomas, Shannon
Date: Thu, Jul 26, 2001 11:04 AM
Subject: Phlebotomy Issue

I have been working with Domingo Aguilar with the DMV about the phlebotomy issue for a couple of months. He has prepared the attached legislative proposal based on our conversation and forwarded his proposal to me which I have attached to this email.

Please review it and let me know what changes you would like to recommend. By working with him we may eliminate the need for us to meet. I faxed a copy of his proposal to DDA Steve Aronis (I don't know his email address).

I have suggested a couple of changes to him. First, labs would probably still contract and pay for phlebotomy services. Second, I had added professional organizational support, i.e., California Association of Criminalists and the California Association of Crime Lab Directors. I need to know from our prosecutors if I can add the CDAA.

At least DMV is on our team!

Patricia Lough, Supervising Criminalist
San Diego Police Department
1401 Broadway, MS 725
San Diego, CA 92101
Phone: 619-531-2460 Fax: 619-531-2520
pkl@pd.sannet.gov

CC: 'Ronald Barry [E-mail]'

APPENDIX F

OFFICE OF
THE CITY ATTORNEY
CITY OF SAN DIEGO

Casey Gwin
CITY ATTORNEY

[Names And Address Omitted In Printing]

The Office of the City Attorney hereby agrees with Michelle Lee to grant Michelle Lee transactional immunity regarding her employment as a phlebotomist on December 27, 2001, and specifically the blood draw done on Frank Busalacchi. The immunity is given in exchange for Michelle Lee's testimony in *People v. Busalacchi*, case number M852234/WH1147. Michelle Lee agrees to testify truthfully in exchange for this grant of immunity. Michelle Lee understands she has the right to consult with an attorney before signing this agreement. Michelle Lee understands the contents of this agreement and signs it freely. There have been no promises made other than those contained in this agreement.

Dated: June 18, 2002 CASEY GWINN, City Attorney

By /s/ D McDonald
Deanna McDonald
Deputy City Attorney

Dated 6/18, 2002 /s/ Michelle R. Lee
Michelle Lee

OFFICE OF
THE DISTRICT ATTORNEY
COUNTY OF SAN DIEGO

PAUL J. PFINGST
DISTRICT ATTORNEY

[Name And Address Omitted In Printing]

September 5, 2002

Mary Prevost, Esq.
3115 Fourth Avenue
San Diego, CA 92103
(619) 692-9001

Re: People v. Kara Glaser – Case Number C222186

Dear Ms. Prevost:

On September 4, 2002, you requested further discovery, specifically a copy of the written immunity agreement given to "a witness" in this case. Upon research into this matter, I learned that at your Motion to Suppress before Judge Goldsmith on July 30, 2002, you raised the issue that the phleobotomist [sic], Michelle Lee, could be charged with a battery for drawing blood from your client. In response, Deputy District Attorney, Pat Mallen offered Ms. Lee transactional immunity. Ms. Lee was advised and the parties agreed to the transactional immunity agreement. The oral agreement was recorded in the record. Since you were present, you are aware that it was an oral agreement done by the parties in response to your motion. There is not a separate written document regarding the transactional immunity granted in this case. I have enclosed, however, a copy of the language that was used by Deputy District Attorney, Pat Mallen and a copy of the Court Minute Order. The only other guidance I can offer you is to refer you to the Court for a transcript.

Please do not hesitate to contact me immediately, if you have any questions or need further assistance at (619) 441-6636.

Sincerely,

/s/ S. Maria Hannah
S. Maria Hannah
Deputy District Attorney

cc: Court File

APPENDIX G

State of California – Health and Human Services Agency
Department of Health Services

[Logos And Names Omitted In Printing]

January 13, 2004

Mary Frances Prevost
Attorney at Law
3115 Fourth Avenue
San Diego, CA 92103

Dear Ms. Prevost,

Our office has received your requests dated July 13, 2004 and October 27, 2004 for information under the Public Records Act concerning phlebotomy and specifically, actions taken against American Forensic Nurses (AFN) and Faye Battiste-Otto.

Our office sent you a packet of information on August 22, 2003 from complaint file # 2003-038 when we thought AFN was in compliance with the law and the case was closed. However, our office has continued to have complaints about AFN that would indicate they may not be in full compliance, and has opened another complaint investigation (file # 2004-009). We regret that the Department of Health Services (Department) has not completed the current investigation and that information cannot be released at this time. We hope to resolve the matter soon, once and for all, and at that time you may have access to the second file.

You asked for all correspondence, e-mail and/or documents from the Department regarding use of phlebotomists to

draw blood for law enforcement, and those all relate to AFN and cannot be released.

You asked for all correspondence, e-mail and/or documents to and from the Department and the Department of Motor Vehicles, and there has been none. However, there has been such communication between the Department and other law enforcement agencies regarding AFN, but these cannot be released.

You sent a list of employees from University Community Medical Center who contracts to provide phlebotomists to San Diego police agencies. You asked us to provide you with licenses issued by the Department. Our office does not license MLA (medical lab assistants), paramedics, licensed vocational nurses and so cannot provide those. Also we regret that we do not have the staff resources to verify the licenses of all the Clinical Laboratory Scientists on the list that you sent.

You asked for licenses (actually "certificates") issued by the Department to phlebotomists employed by AFN. We do not ask or retain employment information on certified phlebotomists.

You asked the license (certificate) status of three phlebotomists employed by AFN. Martha Orozco was certified by the Department on April 24, 2004. Tony Ramirez, on May 6, 2004 and Sarah Villnave on May 19, 2004.

We hope the AFN investigation will be completed soon and the second file can be accessible to you. I apologize for the delay in responding to you as I have been hoping that this

case would soon be resolved. If you have further questions, don't hesitate to contact me at (510) 873-6360.

Sincerely,

/s/ Karen L. Nickel
Karen L. Nickel, Ph.D.
Chief, Laboratory Field Services
Department of Health Services

Cc Cindy Lloyd
Senior Staff Counsel
Office of Legal Services
Department of Health Services

APPENDIX H

IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

PEOPLE OF THE STATE OF CALIFORNIA, Plaintiffs-Respondents, v. ERIC HANS MATELJAN, et al., Defendants-Appellants.	Case No. _____ Court of Appeal Case Nos. D044282 San Diego County Superior County Case Nos. M872592, M875427, CN148819; CN148673; CN 145324; CN 149604

PETITION FOR REVIEW

TO: THE HONORABLE R. GEORGE, CHIEF JUSTICE, AND TO THE HONORABLE ASSOCIATE JUSTICES OF THE SUPREME COURT OF THE STATE OF CALIFORNIA:

Appellant, Eric Hans Mateljan, and the five other appellants in this consolidated action on appeal, respectfully petition for review in this Court following a published decision of the Court of Appeal, Fourth Appellate District, Division One, filed on May 12, 2005, affirming the orders of the San Diego County Superior Court denying appellants' motions to suppress evidence. Appellants' Petition for Re-Hearing was summarily denied on June 1, 2005. A copy of that denial is attached hereto.

ISSUES PRESENTED FOR REVIEW

The City and County of San Diego, and its public prosecutors, entered into a conspiracy with American

Forensic Nurses (AFN) to deliberately, and systematically violate state law; then conspired with prosecutors to hide these illegal activities, thereby violating the constitutional and civil rights of appellants, and thousands of others who were arrested for suspicion of driving while under the influence of alcohol. The courts in that jurisdiction, including the Fourth District Court of Appeal, condoned these illegal activities by disregarding indisputable evidence put before them, and stubbornly refusing to follow the law as set forth by the United States Supreme Court.

The issues presented for review are:

1. THE WHOLESALE VIOLATION OF FEDERAL, STATE AND LOCAL MEDICAL SAFETY REGULATIONS AND PROTOCOL BY UNQUALIFIED PERSONNEL VIOLATES THE FOURTH AMENDMENT; THE COURT OF APPEAL DID NOT APPLY THE SUBSTANTIAL EVIDENCE TEST.

2. THE DUE PROCESS RIGHTS AND EQUAL PROTECTION RIGHTS OF APPELLANTS HEREIN, AND THOUSANDS BEFORE AND AFTER THEM, WERE VIOLATED WHEN PUBLIC PROSECUTORS AND OFFICIALS WITHHELD EVIDENCE FROM DEFENSE ATTORNEYS.

3. THE INTENTIONAL, WILLFUL AND SYSTEMATIC VIOLATION OF THESE LAWS AND PROTOCOL BY PUBLIC PROSECUTORS WARRANTS SUPPRESSION.

IMPORTANCE OF ISSUES

There is no dispute that the state has a legitimate interest in the enforcement of the DUI statutes. The question, then is this: May the City and County of San

Diego deliberately, and persistently, violate the health and safety laws its legislature has enacted, as well as the constitutional rights of its citizens in order to enforce those laws? Indeed, may prosecutors deliberately conceal the facts surrounding evidence gathering for years in order to obtain criminal convictions through the use of inadmissible evidence? Appellants contend the answer must be a resounding, "No."

Appellants herein were each arrested for suspicion of driving while under the influence of alcohol, in violation of Vehicle Code section 23152, subdivisions (a) and (b). Thereafter, they submitted to a chemical test of their blood alcohol content (BAC) as they were required to do under California's "implied consent law." Appellants' blood was drawn by poorly trained, unsupervised phlebotomists in unsanitary conditions at local police stations. Indeed, the testimony in the trial court revealed that they were never trained in Department of Health standards, or the regulation set forth by OSHA and CalOSHA, or any other federal, state or local health regulatory agency for that matter.

As a result, they re-used contaminated phlebotomy supplies from suspect to suspect, leading to contamination of the samples, and exposing appellants to the risk of pain and infection. These conditions existed solely because the City and County of San Diego employed the services of AFN rather than rely upon the services of medically trained and supervised personnel in licensed hospital facilities.

Evidence adduced at suppression motions that spanned months uncovered that prosecutors and crime laboratory personnel knew that this behavior was occurring, but

suppressed that information for years from the defense because allowing the unlawful criminal behavior to continue unchanged saved money for the city and county and ensured convictions. In fact, city and county prosecutors went so far as to provide defense attorneys discovery identifying each blood drawer as a "nurse" when he/she was not at all a nurse.

Nearly 40 years ago, the United States Supreme Court announced in *Schmerber v. California* (1966) 384 U.S. 737, that while the state may collect a drunk driving suspect's blood with or without his or her consent owing to the exigency of the circumstances, the collection fo [sic] that blood must be conducted in a "medically-approved manner" to satisfy the Fourth Amendment. Clearly, the blood draws in the present case were not done in a "medically-approved manner," and thus, appellants' Fourth Amendment rights were violated as a result thereof.

The violation of a substantive right, *e.g.*, the right to be free from unreasonable search and seizure, constitutes a violation of the right to equal protection of the law under a strict scrutiny standard. (*Nordinger v. Hahn* (1992) 505 U.S. 1, 10.) As a result of this clear violation of their constitutional rights under the Fourth Amendment, appellants were denied their right to equal protection under the law.

Indeed, not only were appellants subjected to a clear violation of their Fourth Amendment rights, they were denied due process of the law when prosecutors conspired with law enforcement, including laboratory personnel, to hide the information regarding these unlawful blood draws from appellants and their counsel.

For at least five years, the City and county of San Diego deliberately and persistently violated the constitutional rights of literally thousands of citizens who were arrested for suspicion of driving while under the influence of alcohol. Although [former] Vehicle Code section 23158 specifically excluded phlebotomists from drawing the blood of a suspected drunk driver without direct supervision, and in conformity with the California Code of Regulations, Title 17, the City and County of San Diego, and its public prosecutors, conspired with AFN to facilitate these unlawful blood draws.

Moreover, the record in here is replete with internal memoranda uncovered by the defense outside the criminal discovery arena which revealed that prosecutors and crime laboratory personnel knew of these illegal practices and went to great lengths to conceal them from appellants and their attorneys in violation of the Sixth Amendment and *Brady v. Maryland* (1963) 373 U.S. 83, thereby denying appellants their due process right to a full and fair hearing upon the charges brought against them.

The Fourth Amendment to the United States Constitution provides that no person shall be subjected to an "unreasonable search and seizure." The Fourteenth Amendment provides that no person shall be deprived of life, liberty, or property without the "due process of law." The City and County of San Diego have, over a period of several years, deliberately and systematically deprived appellants, and thousands of other citizens of the right to be free from unreasonable searches through illegal blood draws by untrained, unqualified phlebotomists who conducted these blood draws under medically unsafe conditions. Yet, the courts, ignoring both the evidence and the law, refused to put a stop to this outrage.

Instead, the courts in that jurisdiction upheld and condoned these unlawful searches. It's fair to say, of course, that until appellants herein uncovered the truth of these illegally conducted searches, the courts in general were kept as much in the dark by prosecutors as were the defendants and their counsel. Thus, one would think the trial courts would act, having learned the truth of the matter, however the [sic] did not.

It is incomprehensible of course, that once the truth was put before them, the trial courts simply turned a blind eye, and refused to impose the sanction of suppression against prosecutors for their gross misconduct in hiding evidence which clearly met the Brady standard, *i.e.*, evidence which is either exculpatory to the defendant, or can be used to impeach the prosecution's witnesses.

Even more disturbing, however, is the appellate court's refusal to uphold the law in this regard. The Fourth District Court of Appeal, in the matter at hand, was presented with an abundant record containing incontrovertible evidence that the blood draws were conducted in violation of the Fourth Amendment, and further, that prosecutors had conspired with a contract phlebotomy agency and law enforcement to conceal this evidence from appellants and their counsel. When defense attorneys found out of the subterfuge, prosecutors granted their blood drawers immunity! Indeed, the justices thoroughly chastised these prosecutors during oral argument for such conduct. Yet, the appellate court ignored the evidence presented, and concluded that there was no "*Brady* violation" because there was really no Fourth Amendment violation. (*People v. Mateljan* (2005) 129 Cal.App.4th 367, 376.)

Clearly, in *People v. Esayian* (2003) 112 Cal.App.4th 1031, and *People v. McHugh* (2004) 119 Cal.App.4th 202, the court of Appeal did not have before it the immense record of the breadth of prosecutorial misconduct was not entirely known. Nonetheless, in response to these decisions, and the lobbying efforts of San Diego prosecutors, the legislature has now amended Vehicle Code section 23158 to allow phlebotomists to draw DUI suspects' blood without any supervision whatsoever. The court of Appeal, in part, hung its hat on this change in law when denying appellants' motion.

Deputy District Attorney Laura Tanney, one of the prosecutors in the trial and appellate court cases herein, lobbied the legislature to change the law to allow unsupervised phlebotomists to draw blood.[1] We suspect Ms. Tanney was no more forthright with the legislature about the filthy conditions and practices used in drawing blood than she was the defense attorneys. It is abundantly reasonable to believe that Ms. Tanney did not inform the legislators she contacted that: (1) she had given immunity to phlebotomists for their criminal acts when defense attorneys found out about the unlawful activities; and, (2) the phlebotomists she now wanted to be legally unsupervised violated every health policy they were questioned about.

But she sought a subsequent remedial measure to make the past misconduct of city and county prosecutors more palatable to future courts. But her success is a meager prophylactic band-aid to cover up the history of

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[1] Ms. Tanney was one of the prosecutors who denied that her office withheld relevant evidence at the trial level and insisted to Court of Appeal panel when challenged on this issue, that this was **not** a violation of *Brady*.

the prosecutors' unlawful conduct. And the Court of Appeal, in part, hung once more its hat on this.

The wound still festers underneath the band-aid because AFN to this day is still violating the law. In May 2003, the Department of Health Services issued a statewide cease and desist order against AFN base on defense counsel's investigation. The Department of Health Services has, since the new law went into effect, opened **two** new investigations into AFN's continuing violations of the law. And, as far as we know, nothing has changed as far as the filthy conditions of the jail and the filthy procedures employed by phlebotomists.

So, while it is beyond dispute that unsupervised, unqualified phlebotomists, drawing blood in the filthy conditions present in the local police states does not satisfy the "medically-approved" standard set forth in *Schmerber*, the Court of Appeal has chosen to ignore the law handed down by the United States Supreme court and set new standards which allow prosecutors to obtain criminal convictions through the use of illegally obtained evidence. This Court should therefore grant review to address the obvious constitutional violations present here. If not, *Schmerber* is dead in this land.

THE FACTS

[F]ormer Vehicle Code section 23158 specifically set forth the personnel who were authorized to draw the blood of those suspected of driving while under the influence of alcohol. California Code of Regulations, Title 17, set forth the medically-approved method for such blood draws. These statutes were specifically enacted in 1966 in response to the United States Supreme Court's

landmark decision in *Schmerber v. California*, *supra*, 384 U.S. 737.

The High court recognized that any intrusion in the body of an individual constituted a search, and that the protections fo [sic] the Fourth Amendment apply under such circumstances. The *Schmerber* Court was very clear on the issue:

> It bears repeating, however, that we reach this judgment only on the basis of acts of the present record . . . that we today old [sic] that the constitution does not forbid the states minor intrusions into an individual's body under stringently limited conditions in no way indicates that it permits more substantial intrusions, or intrusions under other conditions. (*Schmerber*, at p. 772 [emphasis added].)

The Court continued:

> We are thus not presented with the serious questions which would arise if a search involving use of a medial technique, even of the most rudimentary sort, were made by other than medical personnel or in other than a medial [sic] environment – for example, if it were administered by police in the privacy of the station house. To tolerate searches under these conditions might be to invite an unjustified element of personal risk of infection and pain. Ibid.

But the City and County of San Diego employed AFN to conduct blood draws under extremely unsanitary conditions, using phlebotomists who had little training and no supervision.

In its summary of the facts, the appellate court stated that "all of the phlebotomists used by AFN had received

post-secondary training as medical assistants, including instruction in phlebotomy. Each of the phlebotomists testified as to their training and experience and the procedures they used in drawing the appellants' blood. The city also offered the testimony of a registered nurse, Alice Cresci, who testified that the phlebotomists performed the blood draws in a medically appropriate manner. Her testimony was supported by the testimony of Dr. Leland Rickman, a UCSD physician who specializes in infectious diseases." (*People v. Mateljan, supra*, 129 Cal.App.4th at p. 372.)

In fact, the record amply showed that most of AFN's phlebotomists had far less than the educational training required to meet state standards. For example, AFN phlebotomist Stacy Walker took a two-month phlebotomy class and her certificate" stated that she had only 10 hours of phlebotomy training in 1998. (MRT 471.)[2] In September 2002, she was no longer allowed to draw blood owing to her lack of credentials. (MRT 413.) Prior to her termination from AFN, she had completed 50-60 legally unauthorized blood draws per month for AFN. (MRT 413.)

Another phlebotomist, Michelle Lee, went to Kelsey-Jenny Business College in 1994, then took a "refresher course" at Boston Reed Company for 16 hours several years later. She only had to do three sticks to pass. (MRT 2730275.) AFN phlebotomist Stephanie Rider received 16 hours of phlebotomy training in San Diego for which she

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[2] The citations herein are to the original record on file in the Court of Appeal. "MRT" refers to "Mateljian Record transcript" and "DRT" refers to Davari/Fanale Record transcript. The issues were more fully briefed therein.

needed 10 sticks in order to get a certificate. (MRT 555-557.)

These are just a few examples of AFN's phlebotomists who had no post-secondary training regarding blood draws, contrary to the misstatement of "fact" by the appellate court.

As to the testimony of prosecution witness Alice Cresci that "the phlebotomists performed the blood draws in a medically-appropriate manner," it should be noted that Ms. Cresci was employed by Pomerado Hospital. (MRT 985.) Ms. Cresci testified that she reused vacutaner tube holders at Pomerado Hospital in violation of OSHA and CalOSHA requirements up until the week before her testimony at the hearing in the trial court. (MRT 1132.) Additionally, Ms. Cresci revealed that she had no knowledge of the OSHA requirements for blood draws and the protocol as to the use of vacutaner tube holders. (MRT 951-954).) Notwithstanding her ignorance of the safety protocol, she was allowed to testify as an "expert." The Court of Appeal did not take into consideration her deficiencies in knowledge of medical protocol when relying on her assessments.

Ms. Cresci's supervisor, Ted Drescher, testified for the defense. He is the phlebotomy manager at Pomerado Hospital. Mr. Drescher testified, *inter alia*, State Health regulations require that one must throw away anything that touches the patient, including the vacutaner tube holder, and that this is a Hospital-wide policy which is strictly adhered to at Pomerado Hospital.[3] (MRT

[3] This, of course, calls into question Ms. Cresci's entire testimony.

1142-1143.) "Expert" Cresci clearly violated these rules set out to ensure the safety of patients.

Kim Dominguez, a supervising phlebotomist at AFN, testified that AFN has no rules, procedures, or protocols regarding the storage of supplies given out to phlebotomists. (MRT 189.) She further testified that she does not clean the area where the blood draws take place in between blood draws. (MRT 161-162.)

There was also ample evidence presented through the testimony of AFN employees, and former employees, during the evidentiary hearing in the trial court, that the AFN phlebotomists stored their kits in unsanitary conditions at their homes, seldom cleaned their supplies, and kept their supplies in tackles boxes bought at discount stores. These supplies were stored in dusty residential garages, under sinks with the household cleans, in closets, and in trunks of cars. Additionally, the phlebotomists never took medical histories from the individuals before they drew their blood, and never monitored them after the blood draw, clear violations of Business and Professions Code section 23612(5)(B) and (C).

Testimony at the evidentiary hearings in the trial courts revealed that forced blood draws took place in the sally port at the jail where there were sometimes several vehicles with engines running in the sally port, and that the chairs where suspects were seated for these blood draws were never sanitized. (MRT 181-183.) According to the testimony of AFN supervising phlebotomist Kim Dominguez, at the police station, blood draws are done in a big room where many individuals go in and out all the time. (MRT 30, 27.) If there was a medical crisis in the jail, there is no one present to assist, and officers must call 911.

(MRT 204.) This leads to the obvious conclusion that the AFN phlebotomists were never supervised as required by Vehicle Code section 23158, and DHS regulations, when the [sic] drew blood at the jail.

Dr. Alan Rickman, while attempting to support the prosecution's insistence that AFN phlebotomists posed no heath risk to those whose blood they drew, had to admit under cross examination that:

1) Storing vacutaner tubes at low or high temperatures could destroy the integrity of the powder and affect the results of the tests;

2) There is a risk of transmission of pathogens to a patient by reuse of blood tube holders;

3) In non-emergency situations, it is not proper to have violations of protocol;

4) Any time there is an invasive procedure such as breaking skin for a blood draw, there is a risk of infection; and,

5) One of the main considerations for using reasonable medical techniques is to obtain a valid sample. (MRT 1316-1361.)

According to Les Revier, the chief of quality assurance at UCSD clinical laboratories, a California Department of health Services licensed and accredited laboratory, the AFN phlebotomists failed to follow almost all of the medically-approved standards set forth in OSHA, CalOSHA, and DHS regulations. (MRT 1162-1239.) It is not accepted medical practice to re-use vacutaner tube holder from patient to patient and only dispose of them when there is visible contamination. (MRT. 1203-1204.) In

cases of emergency, such as a bio-terrorist incident, rules and procedures may be suspended. But, Mr. Revier states, **"I can't imagine having a phlebotomy station in a garage."** (DRT 1205.)

OSHA standards protect the patient. (MRT 1169.) The purpose of the procedure with regard to vacutaner tube holders is to prevent contamination. It used to be that those were taken apart and re-used. **That would be "unheard of" today.** (DRT 1171.)

In preparation for his testimony, Mr. Revier discussed a New York Times article outlining an outbreak of aggressive and painful skin bacteria resistant to antibiotics was appearing in San Francisco and Los Angeles County jails. According to the article, there were more than 1,000 outbreaks in one year. He also found reference to this outbreak in *The Medical Laboratory Observer* which noted it because the bacteria in the jails was also a type of bacteria found in hospitals and it "is starting to become a big topic in the community." (DRT 1225-1229.)

At the hearing brought by appellants who had been arrested in the County of San Diego, most of the same evidence and testimony was presented. Additionally, Dr. Robin testified for the prosecution. According to Dr. Robin, it is a necessity at his hospital that a medical history be taken before a blood draw. Other than in emergency situations, it is not accepted medical practice for physicians giving a blood draw to do so without first having reviewed medical history.

He said medical supplies must be stored properly to ensure the integrity of samples, and it is absolutely mandatory that hands are washed.

He wrote a textbook on transmission of infection in drug users, but that is diametrically opposed to what happens in phlebotomy because "in phlebotomy we take all precautions necessary to prevent infections."

He opined that:

1) If protocol for a procedure is in force, it is not medically-approved not to use it;

2) He follows specific protocol at the hospital for protection of patients and staff;

3) Protocols "ascertain the minimum requirements of procedures and policies as affects – as affect the patients and hospital employees";

4) If one falls below the basic, minimum standards, the hospital could be shut down;

5) It is not medically accepted in the medical community to have protocol and not disseminate it to employees. One must at least follow minium [sic] requirements set out by regulatory agencies;

6) If the minimum requirements outlined by regulatory agencies are not followed, there could be danger to the patient;

7) Hand washing is the single most important procedure for preventing infection;

8) The phlebotomists at his hospital are "thoroughly and rigorously trained on didactic and written materials" and "we observe them and we track them and follow them carefully." (DRT 1360-1367.)

He was unaware of OSHA and CalOSHA regulations precluding the reuse of vacutaner tube holders.[4] He has never visited any of the jails where the blood draws took place. However, he opined that he was not concerned that the phlebotomists in these condition, unlike in his hospital, didn't wash hands regularly, stored phlebotomy supplied in extreme temperatures outside manufacturer's guidelines, and followed no protocol.

While a failure to follow protocol can cause serious risk of danger to patients at his hospital, Dr. Robin was unconcerned with the AFN phlebotomists' wholesale ignorance of any federal, state or local protocol.

Even though protocols are in place to protect the patient, and his hospital would be shut down if he failed to follow regulations and protocol, Dr. Robin was not concerned that these regulations which set out the basic, minimum standards medical personnel cannot fall below, were never even reached by AFN personnel, much less surpassed.

Essentially, Dr. Robin testified that it was medically acceptable for the prosecution's phlebotomists to violate all of the health and safety regulations and protocols that would cause his hospital to be shut down for falling below the standard of care in the community.

In short, DUI suspects are not entitled to protection of health codes and regulations. But his patients and all other citizens, are. He essentially testified that a double standard exists wherein DUI suspects are not entitled to

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[4] Calling into question, of course, the value of his testimony.

the protections of even the most basic health and safety protocol to which every single other citizen is entitled.

Finally, the North County trial court declined to allow the doctor to answer the following question which counsel proffered went to the issue of *Winston v. Lee*: "If two procedures could give the same result, one of which is harmless, and one of which might present some harm, wouldn't one choose the procedure that had no possible contraindications?" The defense position was that there was a perfectly safe breath test to be had in lieu of subjecting suspects to such dangerous blood draws.

The Court said, "The answer is obvious. One always chooses the lesser of two evils."

The trial court also disallowed cross-examination that defense counsel had uncovered that the doctor had lost a malpractice suit for misdiagnosing HIV – one of his claimed specialties – and that he had been sued for misdiagnosing the former San Diego Sheriff's Department crime lab supervisor. The prosecutor had not provided this impeachment evidence to the defense when they provided a witness list.

I. THE WHOLESALE VIOLATION OF FEDERAL, STATE AND LOCAL MEDICAL SAFETY REGULATIONS AND PROTOCOL BY UNQUALIFIED PERSONNEL VIOLATES THE FOURTH AMENDMENT; THE COURT OF APPEAL DID NOT APPLY THE SUBSTANTIAL EVIDENCE TEST.

On appeal from the denial of a motion to suppress evidence on Fourth Amendment grounds, the appellate court reviews the historical facts as determined by the trial court under the "substantial evidence" standard of

review. Once historical facts underlying the motion have been determined, the court reviews those facts and applies the de novo standard of review in determining their consequences. Although appellate court [sic] give deference to the trial court's factual determinations, the reviewing court must independently decide the legal effect of such determinations. (*People v. Ramos* (2004) 34 Cal.4th 494, 505).

We begin with *Schmerber v. California* (1966) 384 U.S. 757. Almost 40 years ago the high court recognized that the taking of a blood sample for driving under the influence (DUI) constitutes a seizure within the meaning of the Fourth Amendment and observed that "the overriding function of the Fourth Amendment is to protect personal privacy and dignity against unwarranted intrusion by the State." (*Schmerber*, *supra*, at p. 767) Accordingly, the Supreme Court set limitations on the circumstances under which the police, acting without a warrant, could seize blood from an arrestee.

Specifically, the Supreme Court held that, in the forced blood draw setting, such a seizure could be lawful only if the officer ordering the blood sample reasonably believed he was confronted with an emergency in that the delay caused by obtaining a warrant would result in the destruction of evidence, the officer had probable cause to believe the suspect had been driving under the influence, and the procedures used to extract the blood were reasonable and medically approved. (*Schmerber, supra*, at pp. 770-772).

It is well held that where a search involves a surgical intrusion beneath the skin, its reasonableness depends in part on "the extend [sic] to which the procedure may

threaten the safety or health of the individual." (*Winston v. Lee* (1985) 470 U.S. 753, 761-762)

Some 29 years after *Schmerber* was decided, the federal courts still struggled with the meaning of what was "medically acceptable." To address the issue of taking blood samples in a "reasonable manner" it was stated in *United States v. Chapel* (9th Cir. 1995) 55 F.3d 1416, "We have defined 'reasonable' in the context of blood draws to mean that "the sample must be taken by trained medical personnel in accordance with accepted practices."

Expanding on the never-ending advances in medicine and never-ending identification of infectious diseases found by research, the court in *Nelson v. City of Irvine*, 143 F.3d 1196 (9th Cir. 1998), likewise acknowledged the risks: **"[M]edical science now teaches us that special precautions should be employed in procedures involving exposure to bodily fluids."** (*Id.* at 1201)[5] [emphasis added].

In 1966 the State of California responded to the arguments in *Schmerber* by enacting Vehicle Code section 23158(a). It established a baseline, minimum standard in our community, authorizing only certain licensed, state qualified individuals to perform a medical procedure which intruded into the Fourth Amendment rights of criminal suspects. Falling below that standard of care of

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[5] The court cited Centers for Disease Control, U.S. Department of Health and Human Services, Guidelines for Prevention of Transmission of Human Immunodeficiency and Hepatitis B Virus to Health-Care and Public Safety Workers, 17-18 (1989) ("Blood from **all** individuals should be considered infective," and the "use of needles and syringes should be limited to situations where there is no alternative").

the community subjects suspects to unjustifiable risk of pain and infection.

Simultaneously, the legislature also enacted then section 13343 (subsequently renumbered section 23612). Hemophiliacs and individuals with taking anti-coagulants were exempt from taking blood tests. Today, section 23612(5)(B) and (C) maintains those exemptions.

As shown *ante*, there was an abundance of evidence presented at the hearing on appellants' suppression motions in the trial court which supported their claim that the taking of their blood by phlebotomists under the above-described conditions violated their Fourth Amendment rights pursuant to the holding in *Schmerber*. In fact, there was practically **no evidence** that could possibly lead a reasonable person to believe that AFN phlebotomists drew blood for chemical testing in a medically-approved manner.[6]

Unlicensed, unqualified phlebotomists, masquerading as "nurses" with permission from public prosecutors, reused medical supplies from patient to patient and, essentially, violated every single federal, state and local protocol enacted to ensure safety of patients.

What became crystal clear during the pendency of these lengthy suppression motions, was that prosecutors asked the local courts, and then the appellate court, to create a double standard where nice, law-abiding citizens should [sic] entitled to the regulatory protections enacted

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[6] These Fourth Amendment issues are fully and completely briefed in both Appellants' Opening Briefs in the Mateljian and Davari cases, and will not be reiterated here.

for the safety of patients, while those safe health and safety regulations should be suspended for suspects in DUI. Their reasoning? It was cheap.

Consistently in the cases of *People v. Esayian, supra,* and *People v. McHugh, supra,* The Court of Appeal dodged the heavy burden of having to sanction prosecutors engaged in the systematic and persistent violations of the law. The Court of appeal in both cases – neither of which included records rife with the evidence of sickening medical practices that was adduced here[7] – hid behind its mantra that violation of a state statute does not warrant suppression.

Of note should be the Court of Appeals' consistent and improper reliance on *People v. McKay* (2002) 27 Cal.4th 601, 607-619), for the proposition that the violation of Vehicle Code section 23158(a) does not warrant suppression. (*Mateljian, supra,* at p. 374)

As shown in the briefing of both the *Mateljian* and *Davari* cases, Vehicle Code section 23158(a) is not just some statute. It is a statute enacted as part of the "implied consent" law and in direct response to the United States Supreme Court's holding in *Schmerber, supra*. As such, Proposition 8 did not preclude suppression based on this state statute, **since it's enactment was based on complying with the Fourth Amendment principles set out in *Schmerber*.** (*See, Davari* AOB, p. 18-20; *Mateljian* AOB, p. 19-26). In support of this, the legislature has declared it is a **"direct threat to the health and safety of the people of the state of California to**

[7] Because, of course, prosecutors were still hiding the *Brady* evidence.

engage in unlicensed activity." (Business & Professions Code section 1285). Vehicle Code sec. 23158(a) is co-extensive with the Fourth Amendment.

But even so, and taking out of the mix the status of the phlebotomists themselves, and the fact that they were pawned off to defense attorneys for years as "nurses", the complete and utter disregard for all federal, state and local health and safety procedures posed a serious risk to these citizens herein, a risk that would never be sanctioned if it occurred in a doctor's office, or in a clinic, or in a hospital, or in a nursing home.

Justice McIntyre sat on the appellate panel in the Esayian case. He saw the writing on the wall and disagreed with the majority.[8] He believed suppression based on such misconduct was appropriate. He was removed from the panel who heard the instant case. This was his opinion of the law and how it should be applied to the malfeasance of the government:

> The United States Supreme Court has stated that the exclusionary rule is a judicially created remedy designed to deter law enforcement misconduct by prohibiting the admission of evidence obtained in violation of the Fourth Amendment. (*Arizona v. Evans* (1995) 514 U.S. 1, 10 [131

[8] The omission of this justice from the panel was noted in counsel's Motion to Recuse Justice Huffman. Appellants request this tribunal to carefully read that application, which is part of the record herein, particularly Ex. E attached thereto, wherein United Stated [sic] District Court Judge William Hayes declined to dismiss a Fourth Amendment claim in a federal sec. 1983 suit because if the facts pleaded about AFN, City and County could be proved, a viable claim under *Schmerber* **exists.** This federal court applying federal law to the exact facts herein came to an entirely different conclusion.

> L. Ed. 2d 34, 115 S. Ct. 1185].) The purpose of the rule is not to cure the constitutional violation, which is already fully accomplished by the illegal search itself, but instead to effectuate the Fourth Amendment's guarantee against unreasonable searches or seizures by deterring future unlawful police conduct. (*Ibid.*) Based on this purpose, the application of the rule is restricted to situations in which the rule's remedial purpose is "effectively advanced," which in turn depends on "the source of the error or misconduct that led to the unconstitutional search and whether, in light of that source, the deterrent effect of exclusion is sufficient to warrant that sanction." (*People v. Willis* (2002) 28 Cal.4th 22, 29-30, [120 Cal. Rptr. 2d 105, 46 P.3d 898]) (*People v. Esayian* (2003) 112 Cal.App.4th 1031, 1047 (dissenting opn. McIntyre)).

Nonetheless, the new appellate court panel, absent the voice of Justice McIntyre, upheld the upheld [sic] the trial courts' denial of appellants' motions to suppress the evidence in their consolidated cases. Appellants contend that it is necessary for this Court to review the appellate court's findings in this regard. Appellants were entitled to the suppression of evidence illegally seized in their criminal cases, and this Court should act to correct its decision, since it was not founded in "substantial evidence."

II. THE DUE PROCESS AND EQUAL PROTECTION RIGHTS OF APPELLANTS HEREIN, AND THOUSANDS BEFORE AND AFTER THEM, WERE VIOLATED WHEN PUBLIC PROSECUTORS AND OFFICIALS WITHHELD EVIDENCE FROM DEFENSE ATTORNEYS.

Here, the appellate court opined that equal protection must be applied only to "a claim of discriminatory

enforcement," citing *Baluyut v. Superior Court* (1996) 12 Cal.4th 826. (*Mateljian, supra*, at p. 376). But "discriminatory prosecution" is not necessary to a claim for a violation of an individual's right to equal protection of the law. No "suspect" class is necessary where a **substance right** has been violated. In addressing an equal protection claim, a standard of strict scrutiny is applied.

California has followed the two-tier approach employed by the United States Supreme Court in reviewing legislative classifications under the equal protection clause. (*Rittenband v. Cory* (1984) 159 Cal.App.3d 410, 417-418.) Under that approach, a strict scrutiny test is applied in cases involving suspect classifications **or** fundamental interests; the rational basis test applies in all other cases. (*Ibid.*) A fundamental interest for strict scrutiny purposes means a fundamental **constitutional** right. (*See* 8 Witkin, Summary of Cal. Law (9th ed. 1988) Constitutional Law, section 602, pp. 55-56.)

In the present case, of course, that constitutional right is the right to be free from "unreasonable search and seizure."

In his dissenting opinion in *Esayian*, Justice McIntyre joined that the prosecutor did not present any evidence as to the safety and sanitation conditions at the detention facility and whether those conditions would comply with the standards applicable to medical facilities. Thus, the prosecutor did not meet its burden of proof to establish the reasonableness of the blood draw for Fourth Amendment purposes. (*See, People v. Jenkins* (2000) 22 Cal.4th 900, 972 [citations omitted]; *see also, United States c.* [sic] *Matlock* (1974) 415 U.S. 164, 171, 177 [citations omitted])" (*Esayian* at p. 1046).

This is so in the present case. Not only did the prosecution utterly fail to prove that the blood draws in question were obtained in a medically-approved manner, appellants show that, to the contrary, they were **not**.

If a regulation affects a certain group of people and a **substantial right** is implicated, the *burden is on the government to show the law is necessary to achieve a compelling government purpose*. The concept of personal privacy is implicit in the concept of "liberty" within the protection of the Due Process Clause; *i.e.*, it is one of those most basic human rights which are of "fundamental" importance in our society. (*Roe v. Wade* (1973) 410 U.S. 113.)

Making money, keeping money, or saving money for a private company is not a "compelling state interest." That, according to Faye Battiste Otto, owner of AFN, is the reason why she did not supply nurses, and the reason why prosecutors hid their malfeasance all these years. Nor is the need for speed a valid basis for violating Equal Protection. (*Bush v. Gore* (2000) 531 U.S. 98.

The violations of Due Process are even easier to grasp. Prosecutors never told these, or any other defense attorneys, that the people they were passing off as "nurses" were storing their phlebotomy supplies and chemical tubes in steamy car trunks in the summer heat, thereby destroying the integrity of any blood sample that might subsequently be placed in them.

Dr. Rickman, Dr. Robin and Les Revier **all agreed**: storing blood tubes in extreme conditions can destroy the integrity of the sample. No one disputed this. They all said so, they all agreed. And the phlebotomists stored their supplies in laundry rooms, garages and car trunks, thus

destroying the integrity of any samples that may later have been placed in them.

And the prosecutors knew. Defense attorneys across the board didn't, and were precluded from cross examining witnesses to attack the integrity of the sample.

We wonder what else is out there that is hidden in the bowels of the crime labs and prosecutors offices in San Diego? Whatever scurrilous conduct was uncovered by the defense, it was done through means independent of the criminal discovery scheme.. What have they hidden that we don't know about? We suspect it is great. But we will never know, and prosecutors continue to get a "pass" notwithstanding the scurrilous behavior they have engaged in thus far across the board.

III. THE DELIBERATE AND PERSISTENT VIOLATION OF STATE LAW HAD BEEN PROVED AND THE BLOOD DRAWS WERE NOT CONDUCTED IN A MEDICALLY-APPROVED MANNER.

In *People v. Esayian, supra,* 112 Cal.App.4th 1031, the majority of the appellate court held that a careful review of the record, including matters judicially noticed by the court, did not establish a systematic and persistent policy by the county to violate the statutory scheme for drawing blood in DUI cases. The Court also held that the mere fact that the phlebotomist "may not have fully complied with the statutory requirements of Vehicle Code section 23158," did not make the procedure a violation of the Fourth Amendment. The constitutional question was, rather, **whether the blood was drawn in a medically-approved permissible manner.** (*Ibid* at p. 1035 [emphasis added].)

In *Esayian*, however, the court did not have the facts it had in the record on appeal here.[9] The Mateljian court had the benefit of the abundant record created below in the trial court wherein the facts are clear – not only did the City and County **deliberately and persistently** violate state law by using unqualified, unsupervised phlebotomists to obtain blood samples, (Veh. Code sec. 23158), **these individuals conducted the blood draws in the most unsanitary manner and conditions imaginable.** In other words, they were **not** blood draws conducted n [sic] a "medically-approved manner" and thus, these blood draws clearly violated the Fourth Amendment.

This *Mateljian* Court indeed recognized there was a systematic and persistent policy by the city and county to violate the statutory scheme for drawing blood in DUI cases. (*Mateljian*, *supra*, at p. 376).

In *In re Garringer* (1987) 188 Cal.App.3d 1149, the court held that a systematic, persistent and deliberate policy of the non-advisement by police officers in compliance with the "Implied Consent" law, would give rise to a claim for violation of Due Process and Equal Protection. Here is a portion of the Deputy City Attorney's dialogue with the court. As one can see, Justice Haller had to finally pin down the prosecutor to get her to admit that the evidence withheld from defense attorneys should have been given over:

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[9] This is so, of course, because San Diego City and County prosecutors his [sic] the information necessary to such findings.

J. HALLER	Speaking theoretically, would a prosecutor be required to advise defense counsel that blood was taken by someone who was not authorized by statute? Is that exculpatory?
DCA TIANA	**I would say no.**
J. HALLER	And why is that?
DCA TIANA	Because it does not violate any constitutional right and, uh, the blood draws were performed in (inaudible) . . .
J. HALLER	(Interjecting) **Is it material exculpatory information under *Brady* the fact that someone not authorized . . .**
DCA TIANA	I don't believe it would allow her to win a suppression motion, and it certainly . . .
J. HUFFMAN	Would it be evidence relevant to the credibility of the taker of the test and the gatherer of the results? Is it not – is there no tendency in reason to believe that a person who does not – is not "qualified" under state statute to do a job might be viewed by trier of fact less credibly than a person who was "qualified?"
DCA TIANA	Well, I think that based on the evidence that did come out in the suppression motion, I think that we show that they were qualified and skilled . . .

J. HALLER	**Actually you know we're passing in the night here. Let's get – the question really relates to this: Does a prosecutor who knows that the person taking the blood draw is not authorized to do so, is that information, that is, exculpatory that needs to be turned over, so that when we're in trial, the defense attorney has a chance to say to the jury, "Oh, by the way, folks, this person isn't authorized," and then to cross-examine that person on what their particular procedure was on that evening?**
DCA TIANA	**Yes.**

The Court chastized [sic] Deputy District Attorney Laura Tanney even more harshly. DDA Tanney stuck to her guns, arguing with the Court that all of the massive evidence withheld by the prosecution didn't amount to *Brady*.

DDA TANNEY	**It's our position that this is not *Brady* information.** Counsel or appellant cannot come up with a theory for something may be exculpatory without any precedent for it and then attempt to argue that that has exculpatory value, when there's absolutely no evidence there is any exculpatory value . . .

J. HUFFMAN	Well, about that issue, if you had a scientist, lab technician, a doctor testifying for the prosecution and it came to light that that person was not authorized by statute authorized to do what he or she was doing, is that not a fact that would bear on the person's credibility?
DDA TANNEY	There is no indication in this case that it has beared on the credibility.
J. HUFFMAN	I did not ask you if it has, I asked you, could it bear on the person's credibility? You mean, a jury might not be influenced knowing that a person's qualifications do not meet those of the statute – that they might not draw an adverse inference to the government's case?
DDA TANNEY	I suppose theoretically it could, but without any concrete evidence, that, such is the case . . .
J. HUFFMAN	**For crying out loud! The county has been running an unauthorized blood draw system for years!**
DDA TANNEY	I agree, and as . . .
J. HUFFMAN	And a jury would not be entitled to know that the person drawing the blood was doing so contrary to state law addressing this specific issue? You're saying to me that's irrelevant and it has nothing to do with the credibility of the government's case?
DDA TANNEY	I'm saying that there's been absolutely no demonstration it has any effect on the admissibility of evidence.

J. HUFFMAN	**Well because it wasn't turned over and the juries did not hear it!**
DDA TANNEY	But until this court makes a determination there's no precedent for the fact that it has any consequence whatsoever in this particular case since there's absolutely no evidence that the people were not unqualified as opposed to unauthorized.
J. HUFFMAN	**Let me just suggest that speaking for myself, it's fortunate that you don't have the Brady issue squarely before us because I think, with all due respect, that argument is utterly unsound on the issue of Brady and its purpose as an exculpatory principle. That it – that hasn't happen [sic] to be before us – we've wondered into it – trying to clarify the issues, but so perhaps we'd be better served to focus on the issues in this case.**

What sanction is there to a prosecutor and a prosecutor's office that would so strongly argue [sic] positions contrary to law? One, of course, that will do it again and again.

Let us note two problems with the way oral argument was conducted in this case. First, as noted both in this segment of oral argument, and subsequently in the written opinion, the justices focused on the licensing aspect almost exclusively when the majority of the thousands of pages of transcripts dealt with dangerous methods used by the blood drawers.

Second, they somehow disengaged the *Brady* issue from the facts at hand. As noted by Justice Huffman above, he says, "[i]t's fortunate that you don't have the *Brady* issue squarely before us here because I think, with all due respect, that argument is **utterly unsound** on the issue of *Brady* and its exculpatory principle."

How it is that this appellate panel would so focus the case away from the clear issues is confounding.

Clearly the issues pleaded focused on unsanitary manner of the blood draws that fell way below the standard of care in the community. Clearly, the issues pleaded focused on the massive – **MASSIVE** – Brady violations perpetrated by city and county prosecutors.

To date, the Department of Health Services has additional investigations opened into continuing violations by AFN. Why would that be? We suggest it is because of the arrogance of prosecutors like those above who believe they are above the law. They condone it, just like the trial courts and appellate court condoned it. And it will continue.

The *Mateljian* Court, alas, found no sanction for the evildoing of its public prosecutors who for so long intentionally and wilfully [sic] withheld so much evidence from the citizens of San Diego, and put so many of the [sic] in danger just to save a dollar.

What better case than this to apply the judicially created sanctions for these constitutional violations outlined by *Arizona v. Evans* and *People v. Willis* and *Garringer, supra*? Of course, there is none.

CONCLUSION

For more than five years the City and County of San Diego prosecutors intentionally and wilfully [sic] sandbagged defense attorneys and put the public at risk. They did this because it was cheap. Every federal, state and local health ad safety regulation and policy raised at the evidentiary hearings was breached by the prosecutors' agents.

The trial courts below condoned these actions. The Court of Appeal in hearing evidence regarding the minimum standards of safety in the community for medical procedures, essentially created a double standard in the application of these rules: The minimum medically-accepted practices in the community apply to all those in clinics, hospitals, nursing homes and other medical establishments. But regarding criminal suspects, the only standard that counts is the cheap one.

As Justice Brandeis noted over three-score years ago, "In a government of laws, existence of the government will be imperiled if it fails to observe the law scrupulously. Our Government is the potent, the omnipresent teacher. For good or for ill, it teaches the whole people by its example. Crime is contagious. If the Government becomes a lawbreaker, it breeds contempt for law; it invites every man to become a law unto himself; it invites anarchy. To declare that in the administration of the criminal law the end justifies the means – to declare that the Government may commit crimes in order to secure the conviction of a private criminal – would bring terrible retribution. Against that pernicious doctrine this Court should resolutely set its face." *Elkins v. United States* (1960) 364 U.S. 206, 223, quoting approvingly *Olmstead v. United States*

(1928) 277 U.S. 438, 485 [Brandeis, J. dissenting]. As should this Court.

If not *Schmerber* is dead in this country.

Dated: June 20, 2005 Respectfully submitted,

MARY FRANCES PREVOST
Attorney for Appellants

APPENDIX I

OFFICE OF THE ATTORNEY GENERAL OF THE STATE OF CALIFORNIA

Opinion No. CV 72-187

1973 Cal. AG LEXIS 18; 56 Op. Atty Gen. Cal. 64

February 15, 1973

REQUEST BY:

ASSEMBLYMAN, 45th DISTRICT

QUESTION:

The Honorable Frank Lanterman, Assemblyman from the Forty-Seventh District, requests an opinion on the following questions:

1. May registered nurses duly licensed under the laws of the State of California legally perform vaccinations, skin tests, inoculations, immunizations, or injections in the absence of a physician but pursuant to the physician's orders; such as, school immunization programs and Public Health Immunization Clinics?

2. May a house physician, licensed under the laws of the State of California, give standing orders regarding hypodermic injections to duly registered nurses employed in the company's outlying facilities, so that the physician need not be in actual attendance while they administer insulin, allergy treatments, and other injections to employees whose private physicians have prescribed them?

The conclusions are:

1. Nurses, registered pursuant to the Nursing Practice Act (section 2700, *et seq.*, of the Business and

Professions Code), may not engage in the practice of medicine as that practice is manifested by vaccinations, skin tests, inoculations, immunizations or injections unless they are under the direction and supervision of a physician and surgeon, certified under the Medical Practice Act (section 2000, *et seq.*, of the Business and Professions Code). These registered nurses will not be under the direction and supervision of a licensed physician and surgeon if no physician has examined the students involved in the school programs or those members of the general public health clinic. Therefore, it is necessary that, at a public health clinic, a physician exercise immediate supervision and control over the nurses. However, as to school immunization programs, Education Code section 11704 requires the governing body of a school board to permit only a physician to administer the immunizing agents.

2. Where a physician has already examined the employee of a company and has prescribed a course of injections or skin tests, a physician need not be present to give immediate supervision and control over the treatment and testing performed by the nurses.

OPINION BY:

EVELLE J. YOUNGER, Attorney General; Charlton G. Holland, Deputy

OPINION:

ANALYSIS

The initial question posed to this office is whether nurses, registered pursuant to the Nursing Practice Act

(section 2700, *et seq.*, of the Business and Professions Code[1] may give vaccinations, skin tests, inoculations, immunizations, or injections in the absence of a physician but pursuant to the orders of a physician. It is the conclusion of this office that the immediate presence of a physician is unnecessary where the physician has examined the patients who will receive these treatments or tests before they are administered by the registered nurse. In the event that the patient has not been examined, and this circumstance must be considered a material one to this question since reference is made in the question to school immunization programs and public health clinics, for the registered nurse to give the treatments will be unlawful.

Although the opinion request appears to assume that nurses might administer immunizing agents during a school immunization program, Education Code section 11704 requires the governing body of a school board to permit only a licensed physician and surgeon to perform this task. Accordingly, this fact must be held in mind in any interpretation of this answer to the opinion request.

All of these treatments or tests require the penetration of the tissues of the human body. According to section 2137 of the Medical Practice Act (section 2000 *et seq.*), the penetration or severance of the tissues of the human body are acts which only certified physicians and surgeons may lawfully perform. See *People* v. *Fowler*, 32 Cal. App. 2d Supp. 737, 740 (1938). Moreover, the giving of an injection falls within the practice of medicine as defined in section 2141 of the Medical Practice Act. See *People* v. *Mangiagli*,

[1] All section references are to the Business and Professions Code unless otherwise noted.

97 Cal. App. 2d Supp. 935, 940 (1950); accord, *Thomas* v. *Virginia Mason Hospital*, 152 Wash. 297, 277 Pac. 691, 693 (1929).

Registered nurses are prohibited from the practice of "medicine or surgery" by section 2726 of the Nursing Practice Act. Nevertheless, section 2725 defines the scope of nursing in terms of the training registered nurses receive at an accredited nursing school in scientific medicine which will permit them to exercise the skills and knowledge derived from this training "in conjunction with curative or preventative medicine as prescribed by a licensed physician."

Magit v. *Board of Medical Examiners*, 57 Cal. 2d 74 (1961), concerned the employment by a physician of unlicensed but well-trained persons to administer anesthetics during an operation. However, the Supreme Court felt constrained to discuss the conditions under which a registered nurse might engage in the practice of medicine. The Supreme Court pointed out that whatever practice of medicine in which a registered nurse might engage must be located within the "broad" definition of section 2725 and that, as a minimum standard, registered nurses must understand the cause and effect of the acts they perform. *Id.* at 83.

As a preamble to its discussion of registered nursing, the Supreme Court made the following observation:

> "It has generally been recognized that the functions of nurses and physicians overlap to some extent, and a licensed nurse, when acting under the direction and supervision of a licensed physician, is permitted to perform certain tasks which, without such direction and supervision, would

constitute the illegal practice of medicine. . . . " *Ibid.*

It is the understanding of this office that registered nurses are trained at their accredited schools to perform all the treatments mentioned in the question and that such treatments are common practice by registered nurses. See "1955 Report to the Legislature by the Senate Interim Committee on Licensing Business and Professions," Vol. 2 of Appendix to Journal of the Senate, 1955, p. 100 (Reg. Sess. 1955). Consequently, holding in mind the admonition of the Supreme Court that the practice of medicine of registered nurses must be performed under the direction and supervision of a physician, it is the conclusion of this office that these treatments may be performed by registered nurses but that these treatments may only be performed under the immediate direction and supervision of a physician where the physician does not first examine the person and issue an appropriate order.

Reason dictates that there is no supervision and control over a registered nurse where a physician simply gives the registered nurse a blanket order to administer these treatments to a general, unclassified group of persons. The fact that the registered nurse may be fully trained and competent to perform the acts involved or by custom and practice does in fact perform these acts, is immaterial to the standard set by the Supreme Court in *Magit* that registered nurses must be under the direct control of a physician when they engage in the practice of medicine. See also *Crees* v. *Board of Medical Examiners*, 213 Cal. App. 2d. 195, 205-208 (1963), (immaterial that unlicensed persons are competent to practice medicine).

Accordingly, in public health clinics, although a nurse may give the injections or perform the other acts mentioned in the question, she must perform these acts only upon the order of a physician who will exercise direction and control over her conduct.

If a registered nurse must be under the direction and control of a physician when she gives injections and skin tests, is it necessary that the physician be physically present with the nurse when she gives these treatments?

In the answer to the first question, it was pointed out that where no physician has seen and prescribed or directed the treatments or tests to be given an individual, the nurse must act under the immediate supervision and control of a physician. This conclusion is true although nurses are trained and skilled in the injections and skin tests mentioned in the question and although, as required by *Magit, supra*, they fully understand the cause and effect on the individual of the acts they perform.

However, the second question assumes that this treatment or testing has been prescribed by a personal physician of the employee and that the nurse is acting under the orders of a house physician to administer these tests and injections pursuant to these orders of their personal physicians. Since the question states this treatment is performed in the outlying facilities of a company, the personal physicians of these employees must be considered unavailable.

In *Magit, supra*, the Supreme Court emphasized that the authority of registered nurses to engage in the practice of medicine derived from the statutory scheme through which they are licensed and regulated. *Id.* at 84. This office has found no cases which directly hold that a

registered nurse may administer skin tests or give injections without the immediate direction and supervision of a licensed physician and surgeon. However, in *People* v. *Rehman*, 253 Cal. App. 2d 119 (1967), four persons, none of whom were registered nurses, were convicted of conspiracy within the meaning of section 182 of the Penal Code for, among other things, engaging in the practice of medicine without a license as set forth in section 2141. During the course of the trial, the judge gave the following instruction:

> "It is not unlawful for a licensed registered nurse to administer injections of drugs or medicines, or to draw blood, provided such acts have been ordered by a licensed physician." *Id.* at 160.

This instruction was approved by the appellate court without discussion about whether or not such injections or blood sampling have to be made under the immediate supervision and control of a physician. *Id.* at 161. There is good reason to conclude that the Court in *Rehman, supra*, was correct.

This office has always issued its opinions cautiously to avoid any precipitous expansion in the practice by non-physicians into the field of medicine as defined in section 2141. See 19 Ops. Cal. Atty. Gen. 201 (1952); 39 Ops. Cal. Atty. Gen. 228 (1962); 50 Ops. Cal. Atty. Gen. 125 (1967). This caution is well supported by judicial authority. *People* v. *Nunn*, 65 Cal. App. 2d 188, 194-195 (1944); *Cooper* v. *State Board of Medical Examiners*, 35 Cal. 2d 242 (1950); *Newhouse* v. *Board of Osteopathic Examiners*, 159 Cal. App. 2d 728, 734-735 (1958). See *Painless Parker* v. *Board of Dental Examiners*, 216 Cal. 285, 295 (1932). Nevertheless, we note that section 2860.5 authorizes vocational nurses, licensed pursuant to the Vocational Nursing Act

(commencing with section 2840) "when directed by a physician and surgeon" to administer medications by hypodermic injection and to withdraw blood. For the withdrawal of blood, however, a licensed physician and surgeon must instruct the vocational nurse concerned who must demonstrate competence in the proper procedure. Section 2860.5.

The scope of vocational nursing is more restricted in training and skills than that permitted registered nursing. Compare section 2859 with section 2725; 50 Ops. Cal. Atty. Gen. 125 (1967); 12 Ops. Cal. Atty. Gen. 228 (1948).

It would create an anomalous and an unacceptable circumstance if vocational nurses were authorized to perform acts of medical treatment which registered nurses with their greater training and skill were unauthorized to perform unless in the presence of a physician. Accordingly, it must be concluded that the administration of medications through injection may be performed by a registered nurse in the absence of a licensed physician and surgeon when the nurse has received orders for such injections from a physician concerning the particular patient to be treated.

APPENDIX J

OFFICE OF THE ATTORNEY GENERAL
OF THE STATE OF CALIFORNIA

Opinion No. CV 73-173

1973 Cal. AG LEXIS 114; 56 Op. Atty Gen. Cal. 523

December 6, 1973

REQUEST BY:

DISTRICT ATTORNEY, MONTEREY COUNTY

QUESTION:

The Honorable William P. Curtis, District Attorney of Monterey County, requests an opinion on the following question:

Do persons, other than physicians, authorized to withdraw blood for purposes of determining alcoholic content under Vehicle Code section 13354 of the implied consent law, have to be under the direction and supervision of a physician when withdrawing blood from a person?

The conclusion is:

Under Vehicle Code section 13354, authorized persons other than physicians may independently withdraw blood from persons for purposes of detecting alcoholic content without being under the direction and supervision of a physician when directed to do so by a peace officer.

OPINION BY:

EVELLE J. YOUNGER, Attorney General; Louis C. Castro, Deputy

OPINION:

ANALYSIS

Under the State implied consent law a person who drives a motor vehicle is deemed to have given his consent to a chemical test of his blood, breath, or urine for purposes of detecting alcoholic content if lawfully arrested for any offense committed while driving under the influence of intoxicating liquor. *See* Vehicle Code section 13353. Vehicle Code section 13354 in turn specifies who is authorized to withdraw blood for purposes of determining alcoholic content. Vehicle Code section 13354 states:

> "(a) *Only a physician, registered nurse, licensed vocational nurse, or duly licensed clinical laboratory technologist or clinical laboratory bioanalyst acting at the request of a peace officer may withdraw blood for the purpose of determining the alcoholic content therein.* This limitation shall not apply to the taking of breath specimens.
>
> (b) The person tested may, at his own expense, have a physician, registered nurse, licensed vocational nurse, duly licensed clinical laboratory technologist or clinical laboratory bioanalyst or any other person of his own choosing administer a test, in addition to any administered at the direction of a peace officer, for the purpose of determining the amount of alcohol in his blood at the time alleged as shown by chemical analysis of his blood, breath or urine. The failure or inability to obtain an additional test by a person shall not preclude the admissibility in evidence of the test taken at the direction of a peace officer.

(c) Upon the request of the person tested full information concerning the test taken at the direction of the peace officer shall be made available to him or his attorney.

(d) *No physician, registered nurse, licensed vocational nurse, or duly licensed clinical laboratory technologist or clinical laboratory bioanalyst, or hospital, laboratory or clinic employing or utilizing the services of such physician, registered nurse, licensed vocational nurse, or duly licensed laboratory technologist or clinical laboratory bioanalyst*, owning or leasing the premises on which such tests are performed, *shall incur any civil or criminal liability as a result of the proper administering of a blood test when requested in writing by a peace officer to administer such a test.*

(e) If the test given under Section 13353 is a chemical test of urine, the person tested shall be given such privacy in the taking of the urine specimen as will insure the accuracy of the specimen and, at the same time, maintain the dignity of the individual involved.

(f) The Department of the California Highway Patrol, in cooperation with the Department of Health or any other appropriate agency, shall adopt uniform standards for the withdrawal, handling, and preservation of blood samples prior to analysis." (Emphasis added.)

In regards to what manner of withdrawing blood is contemplated under Vehicle Code section 13354 subdivision (a), section 1219.1 of title 17 of the California Administrative Code was adopted pursuant to Vehicle Code section 13354 subdivision (f). Section 1219.1 provides in part:

> "Blood samples shall be collected by *venipuncture* from living individuals as soon as feasible after an alleged offense *and only by persons authorized by section 13354 of the Vehicle Code*. Sufficient blood shall be collected to permit duplicate determinations." (Emphasis added.)

From the above quoted statute and regulation it is apparent that only a physician, registered nurse, licensed vocational nurse, licensed clinical laboratory technologist or clinical laboratory bioanalyst acting at the request of a peace officer is authorized to withdraw blood by venipuncture.[1] It is noted that the authorized individuals are mentioned in the disjunctive and that there is no reference or indication that the non-physician individuals must be under the direction and supervision of a physician when withdrawing blood. *Cf. Westmoreland* v. *Chapman*, 268 Cal. App. 2d 1, 5-6 (1968). Unless otherwise indicated, Vehicle Code section 13354 must be interpreted as permitting the non-physician individuals to independently withdraw blood without being under the direction and supervision of a physician. Accordingly, in confirming or denying such authority it is necessary to examine the

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[1] It is to be noted that Vehicle Code section 13354 subdivision (b) provides that the person tested may have an additional chemical test performed by "any other person of his own choosing" other than a physician, registered nurse, licensed vocational nurse, licensed laboratory technologist or clinical laboratory bioanalyst. Although there is no indication of who those persons can be, it is reasonable to assume that such persons would have to be permitted by law to perform the test procedures. Under Vehicle Code section 13354 subdivision (a) however, a peace officer can only request that blood be withdrawn by a physician, registered nurse, licensed vocational nurse, clinical laboratory technologist or clinical laboratory bioanalyst. Accordingly, for purposes of this opinion we have confined ourselves to discussing the capacities and authority of the aforementioned individuals.

licensing authority of the non-physician individuals mentioned in Vehicle Code section 13354.

In 56 Ops. Cal. Atty. Gen. 64 (1973), this office recognized that the withdrawing of blood (which necessarily includes venipuncture) from persons is one of the functions which a registered nurse may independently perform under the Nursing Practice Act in the absence of a physician when the registered nurse has received orders from the physician concerning the particular patient to be treated. *Cf.* Business and Professions Code section 2727.3 added by Statutes 1973, chapter 204.

And in 56 Ops. Cal. Atty. Gen. 11 (1973) this office held that in addition to venipuncture and skin puncture, arterial puncture was one of the methods which licensed vocational nurses could utilize in independently withdrawing blood under Business and Professions Code section 2869.5, if such nurse had been directed to do so by a physician and had previously shown competence to the physician in the procedure.[2]

With regard to chemical laboratory technologists and clinical laboratory bioanalysts it is noted that such individuals are licensed by the State Board of Public Health under the Clinical Laboratory Technology *Act*. *See*

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[2] Business and Professions Code section 2860.5 provides:

"A licensed vocational nurse when directed by a physician and surgeon may do all of the following:

(a) Administer medications by hypodermic injection.

(b) Withdraw blood from a patient for the purpose of testing, if prior thereto such nurse has been instructed by a physician and surgeon and has demonstrated competence to such physician and surgeon in the proper procedure to be employed when withdrawing blood."

Business and Professions Code section 1200 *et seq.* Business and Professions Code section 1242 of the Clinical Laboratory Technology Act provides:

> "Any person duly licensed under the provisions of this chapter to perform tests called for in a clinical laboratory may perform arterial puncture, *venipuncture*, or skin puncture for purposes of withdrawing blood or for test purposes as defined by regulations established by the board *and upon specific authorization from any person in accordance with the authority granted under any provisions of law relating to the healing arts.* The board may by regulation authorize unlicensed laboratory personnel to perform venipuncture or skin puncture for the purposes of withdrawing blood or for test purposes as defined by regulations established by the board and shall establish the minimum training required for such persons."

It is clear therefore that those non-physician individuals mentioned in Vehicle Code section 13354 are by law permitted to withdraw blood by venipuncture. And it is equally clear that such individuals have the authority to withdraw blood independently without being under the direction and supervision of a physician *once they have been directed by a physician or some other authorized person upon whom to perform the procedure, e.g.*, when requested by a peace officer. Thus, it is our opinion that the non-physician individuals mentioned in Vehicle Code section 13354 can withdraw blood independently without having to be under the direction and supervision of a physician if they have been *lawfully* directed to do so.

It is true that 56 Ops. Cal. Atty. Gen. 64 (1973) and the various licensing laws speak in terms of the non-physician

individuals withdrawing blood upon direction from a physician or some other authorized person. However, such direction is only ministerial in that the physician merely designates to the non-physician individual the person from whom blood is to be withdrawn. Such direction on the part of the physician should not be equated with having to be under the direction and supervision of a physician which would require the attendance of a physician. There is no question that the non-physician individuals are competent to independently withdraw blood by venipuncture without the attendance of a physician *once they have been lawfully directed to perform the procedure*. This is consistent with Vehicle Code section 13354 which requires a peace officer rather than a physician to direct upon whom the procedure is to be performed. The fact that a peace officer rather than a physician performs the ministerial function of directing from whom blood is to be withdrawn in no way minimizes the competence in the performing of the procedure. A peace officer under Vehicle Code section 13354 therefore is one who may lawfully direct the defined individuals to withdraw blood.

In addition to being burdensome it would be absurd and frivilous to require a physician in attendance with the peace officer under Vehicle Code section 13354, for purposes of merely having the physician direct competent non-physician individuals to withdraw blood from the persons arrested. The aforementioned is consistent with the rule of statutory construction that statutes must be given a reasonable and common sense construction which construction should be one that is practical rather than technical and that will lead to a wise policy rather than to mischief or absurdity. *Morris* v. *Olney*, 217 Cal. App. 2d 864, 870 (1963).

In summary it is concluded that under Vehicle Code section 13354, registered nurses, licensed vocational nurses, clinical laboratory technologists, and clinical laboratory bioanalysts may independently withdraw blood by venipuncture when requested to do so by a peace officer without being under the direction and supervision of a physician.

APPENDIX K

OFFICE OF THE ATTORNEY GENERAL
OF THE STATE OF CALIFORNIA

Opinion No. CV 75-326

1976 Cal. AG LEXIS 20; 59 Op. Atty Gen. Cal. 112

February 19, 1976

REQUEST BY:

EXECUTIVE SECRETARY, BOARD OF VOCATIONAL NURSE AND PSYCHIATRIC TECHNICIAN EXAMINERS

QUESTION:

The Honorable Maryellen Wood, R.N., Executive Secretary of the Board of Vocational Nurse and Psychiatric Technician Examiners, has requested the opinion of this office on the following question:

May licensed vocational nurses working in licensed blood banks perform skin puncture and venipuncture for the purpose of collecting whole blood?

The conclusion is:

Licensed vocational nurses working in licensed blood banks may perform skin puncture and venipuncture for the purpose of collecting whole blood upon authorization from any licensed physician and surgeon or any licensed dentist provided that prior thereto such licensed vocational nurses have been instructed by a physician and surgeon and have demonstrated competence to such physician and surgeon in the proper procedure to be employed when withdrawing blood, or have satisfactorily completed a prescribed course of instruction approved by

the Board of Vocational Nurse and Psychiatric Technician Examiners of the State of California, or have demonstrated competence to the satisfaction of said Board.

OPINION BY:

EVELLE J. YOUNGER, Attorney General; Barbara T. King, Deputy

OPINION:

ANALYSIS

An analysis of the question posed here requires consideration not only of the Vocational Nursing Practice Act (Bus. & Prof. Code § 2840 *et seq.*), but of the Human Whole Blood, Human Whole Blood Derivatives, and Other Biologics Act (Health & Saf. Code § 1600 *et seq.*) and the Clinical Laboratory Technology Act (Bus. & Prof. Code § 1200 *et seq.*).[1] We begin our analysis with a review of the pertinent provisions of the Vocational Nursing Practice Act.

Vocational nurses were first licensed in this state in 1951 with the enactment of the Vocational Nursing Practice Act (§ 2840 *et seq.*). Section 2859 defines the practice of licensed vocational nursing[2] as follows:

> "The practice of vocational nursing within the meaning of this chapter is the performance of services requiring those technical, manual skills

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[1] All section references are to the Business and Professions Code unless otherwise indicated.

[2] Hereinafter, licensed vocational nursing and licensed vocational nurses will be referred to as "vocational nursing" and "vocational nurses," respectively.

> acquired by means of a course in an accredited school of vocational nursing, or its equivalent, practiced under the direction of a licensed physician, or registered professional nurse,. . . .
>
> "A vocational nurse, within the meaning of this chapter, is a person who has met all the legal requirements for a license as a vocational nurse in this State and who for compensation or personal profit engages in vocational nursing as the same is hereinabove defined."[3]

Section 2860 provides that vocational nurses have no authority "to practice medicine or surgery."[4]

The Clinical Laboratory Technology Act (§ 1200 *et seq.*) added in 1951 provides for the general supervision of clinical laboratories within the State of California. Unless otherwise excluded, this legislation applies to all clinical laboratories as defined by section 1206.

In 1963, the Human Whole Blood, Human Whole Blood Derivatives, and Other Biologics Act (Health & Saf. Code § 1600 *et seq.*) was added. As enacted, Health and Safety Code section 1600.2 defines a "blood bank" as:

> "Any place where human whole blood, and human whole blood derivates specified by regulation, are collected, prepared, tested, processed, or stored, or from which human whole blood or human whole blood derivatives specified by regulation are distributed."

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[3] Added by Stats. 1951, ch. 1689, p. 3890, § 1.

[4] *Id.*

Health and Safety Code section 1607 provides in pertinent part as follows:

> "Notwithstanding any other provision of law, licensed clinical laboratory bioanalysts, licensed clinical laboratory technologists, registered clinical laboratory technologist trainees, and registered nurses may perform skin puncture and venipuncture for the purposes of collecting human whole blood, provided that (1) such acts are performed in a blood bank licensed pursuant to this chapter, and (2) the acts are performed under the direct and responsible supervision of a licensed physician and surgeon. The licensing and registration referred to in this section shall be licensing and registration pursuant to the Business and Professions Code."

Health and Safety Code section 1608 further provides that the Human Whole Blood, Human Whole Blood Derivatives, and Other Biologics Act "does not repeal or in any manner affect any provision of the Business and Professions Code relating to the practice of medicine."

Specific inquiry has been made as to whether the failure to include vocational nurses in the authorization of Health and Safety Code section 1607 would preclude vocational nurses from performing skin puncture and venipuncture in a licensed blood bank in light of the fact that sections 1242.6 and 2860.5 have been added and amended since, the conclusions rendered in 50 Ops. Cal. Atty. Gen. 125, 128 (1967).

The question presented is one of statutory construction, specifically whether under the doctrine of *expressio unius est exclusio alterius*, the enumeration of persons as coming within the operation or exception of Health and

Safety Code section 1607 will preclude the inclusion by implication in the class excepted of other persons, *Williams* v. *Los Angeles Metropolitan Transit Authority*, 68 Cal. 2d 599, 603-604 (1968), or whether the subsequent amendments of sections 1242.6 and 2860.5 were clearly intended by the Legislature as amendments by implication to Health and Safety Code section 1607 in which event the legal maxim will not be utilized to contradict or vary a clear expression of legislative intent. *Id.; Dickey* v. *Raisin Proration Zone No. 1*, 24 Cal. 2d 796, 811 (1944).

It is an established rule of statutory construction that statutes are to be given a reasonable interpretation. *City of Santa Clara* v. *Von Raesfeld*, 3 Cal. 3d 239, 248 (1970); *In re Marriage of Cary*, 34 Cal. App. 3d 345, 352 (1973). Above all, the intention of the Legislature must be ascertained, *People* v. *Superior Court*, 70 Cal. 2d 123, 132 (1969), with due regard to the language used, and the purpose sought to be accomplished. *Cedars of Lebanon Hosp.* v. *County of L.A.*, 35 Cal. 2d 729, 735 (1950); *Richie* v. *Tate Motors, Inc.*, 22 Cal. App. 3d 238, 243 (1971). Absurd results are to be avoided if possible. *In re Cregler*, 56 Cal. 2d 308, 312 (1961).

Furthermore, statutes on the same subject matter must be construed together in the light of each other so as to harmonize them if possible, *County of Placer* v. *Aetna Cas. Etc. Co.*, 50 Cal. 2d 182, 188-189 (1958), although they were passed at different times, *Estate of Wright*, 98 Cal. App. 633, 635-636 (1929), and although one deals specifically and in greater detail with the subject than does the other. *Pierce* v. *Riley*, 21 Cal. App. 2d 513, 518 (1937).

When two laws on the same subject, passed at different times, are repugnant or inconsistent with each other, the one passed first in point of time must yield. *County of Ventura* v. *Barry*, 202 Cal. 550, 556-557 (1927). The latter act is deemed to supersede or repeal the first on the ground that in enacting it the Legislature must have intended to repeal any prior statute to which it is repugnant, or with which it is so inconsistent that the two cannot stand together. *Christy* v. *B. S. Sacramento Co.*, 39 Cal. 3, 10 (1870). While repeals by implication of code sections are not favored, they are tolerated when no reasonable basis can be found for harmonizing a new enactment with an existing code section. *People* v. *Leong Fook*, 206 Cal. 64, 69-70 (1928). See generally 45 Cal. Jur. 2d, Statutes, §§ 81 and 85.

It has consistently been held that the penetration of the tissues of a human being in the treatment of disease or injury, or for test or analysis purposes constitutes the practice of medicine. See *People* v. *Fowler*, 32 Cal. App. 2d Supp. 737 (1938); 50 Ops: Cal. Atty. *Gen., supra*, 125, 127; 39 Ops. Cal. Atty. Gen. 228, 229 (1962); 21 Ops. Cal. Atty. Gen. 230 (1953). Unless one engaging in the practice of medicine is licensed under the State Medical Practice Act (§ 2000 *et seq.*) or is otherwise authorized to engage in such acts, he is in violation of section 2141. *Magit* v. *Board of Medical Examiners*, 57 Cal. 2d 74, 84 (1961); 50 Ops. Cal. Atty. *Gen., supra*, 125, 127.

Blood may be drawn from a person by skin puncture or venipuncture.[5] Both methods involve penetration of

[5] Sections 1242, 1242.5 and 1246 authorize certain specially trained clinical laboratory personnel to perform both venipuncture and/or skin puncture for test purposes upon proper authorization. See

(Continued on following page)

human tissue. Whereas skin puncture merely involves the pricking of a finger or some other part of the body to obtain very small quantities of blood for test or analysis purposes, venipuncture contemplates the penetration of a vein with a hypodermic needle. 50 Ops. Cal. Atty. Gen., *supra*, 125, 127.

In 50 Ops. Cal. Atty. Gen., *supra*, 125, this office held that a vocational nurse was prohibited from performing venipuncture, but where acting under the immediate direction of a physician and surgeon could perform skin puncture. That holding was based on the definition of vocational nursing as set forth in section 2859 and upon the fact that venipuncture was not taught in vocational nursing schools nor was it practiced at that time by vocational nurses. It was concluded that:

> "Under the doctrine of *Expressio Unius Est Exlusio* [sic] *Alterius* the failure to include licensed vocational nurses in such authorization precludes them from performing skin punctures but only to the extent and in the situation that such procedure is authorized by those sections. [Citation omitted.]" *Id.* at p. 128.

Subsequent to the above mentioned opinion, in 1968 the Legislature enacted section 2860.5 as part of the Vocational Nursing Practice Act. Subdivision (b) of section 2860.5 permitted vocational nurses to withdraw blood from a patient in a hospital for the purpose of testing, if

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generally 50 Ops. Cal. Atty. Gen., *supra*, 125, 127; 19 Ops. Cal. Atty. Gen. 201 (1952). See also Vehicle Code section 13354, subdivision (a), which specifically authorizes vocational nurses to withdraw blood at the request of a peace officer for the purpose of determining the alcoholic content therein. 56 Ops. Cal. Atty. Gen. 523, 524-526 (1973).

prior thereto the vocational nurse had been instructed by the physician and surgeon in the proper procedure to be employed when withdrawing blood. Thereafter in 1969, subdivision (b) of section 2860.5 was amended by the Legislature to remove the restriction that blood be withdrawn by the vocational nurse "in a hospital" and add the requirement that the vocational nurse first "demonstrate competence" to such physician and surgeon. Subdivision (b) of section 2860.5 was most recently amended by the Legislature in 1974 to its current form to provide as follows:

"A licensed vocational nurse when directed by a physician and surgeon may do all of the following:

". . . .

"(b) Withdraw blood from a patient, if prior thereto such nurse has been instructed by a physician and surgeon and has demonstrated competence to such physician and surgeon in the proper procedure to be employed when withdrawing blood, or has satisfactorily completed a prescribed course of instruction approved by the board, or has demonstrated competence to the satisfaction of the board."

In subsequently interpreting section 2860.5 in 56 Ops. Cal. Atty. Gen. 11, 13-14 (1973), this office noted that there was no indication that the term "withdraw blood" as used in section 2860.5 was intended to have a restricted definition and accordingly held that in addition to skin puncture and venipuncture vocational nurses could utilize arterial puncture for purposes of obtaining blood samples for testing, provided such procedure was performed by such nurse if directed to do so by a physician and surgeon and if

prior thereto such nurse had been instructed by a physician and surgeon and had demonstrated competence to such physician and surgeon in the proper procedure to be employed in performing arterial puncture. It was further noted that:

> "50 Ops. Cal. Atty. Gen. 125 (1967) or any previous opinion of this office to the extent inconsistent with the conclusions reached herein is superseded by the recent legislation referred to above (Business and Professions Code section 2860.5)." *Id.* at p. 14. See also 56 Ops. Cal. Atty. Gen. 64, 68 (1973).

In 1974 section 1242.6, which had been added in 1973, was amended by the Legislature. It was specifically noted in the Legislative Counsel's Digest at that time that this amendment was to provide "that licensed vocational nurses in addition to registered nurses may perform arterial puncture, venipuncture, or skin puncture for purposes of withdrawing blood or for test purposes upon authorization from any licensed physician and surgeon" following instruction and demonstration of competence. As amended in 1975, section 1242.6 currently provides as follows:

> "(a) Any registered nurse licensed under the provisions of Chapter 6 (commencing with Section 2700) of Division 2 may perform arterial puncture, venipuncture, or skin puncture for the purposes of withdrawing blood or for test purposes upon authorization from any licensed physician and surgeon or any licensed dentist.
>
> "(b) Any licensed vocational nurse licensed under the provisions of Chapter 6.5 (commencing with Section 2840) of Division 2 may perform arterial puncture, venipuncture, or skin puncture

> for the purposes of withdrawing blood or for test purposes upon authorization from any licensed physician and surgeon, or any licensed dentist if prior thereto the licensed vocational nurse has been instructed by a physician and surgeon and has demonstrated competence to such physician and surgeon in the proper procedure to be employed when withdrawing blood, or has satisfactorily completed a prescribed course of instruction approved by the Board of Vocational Nurse and Psychiatric Technician Examiners of the State of California or has demonstrated competence to the satisfaction of such board."[6]

As previously noted, penetration of the tissues of a human being in the treatment of disease or injury, or for test or analysis purposes constitutes the practice of medicine. Thus, only those licensed to practice medicine pursuant to the State Medical Practice Act (§ 2000 *et seq.*) or otherwise authorized to engage in such acts may perform skin puncture and venipuncture for the purposes of withdrawing human blood. However, at the time that Health and Safety Code section 1607 was added in 1963, few licensees, other than physicians and surgeons, were authorized to perform skin puncture and venipuncture for the purposes of withdrawing human blood.

That the Legislature understood this fact, but nevertheless intended to create a specific exception for blood banks meeting certain requirements, is evident from the

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[6] The first full paragraph of section 1242.6 was added in 1973. The section was, thereafter, amended in 1974 to add subdivision "(b)," and designate the first paragraph as subdivision "(a)." The section was most recently amended in 1975 to add the phrase "or any licensed dentist" to subdivisions "(a)" and "(b)."

opening phrase of Health and Safety Code section 1607 which begins, "Notwithstanding any other provision of law. . . . " The extent to which Health and Safety Code section 1607 authorizes the performance of skin puncture and venipuncture by individuals not otherwise authorized to perform such acts, the doctrine of *expressio unius est exclusio alterius* is properly applicable to preclude the inclusion by implication, in the class excepted (from the general prohibition against the practice of medicine) of other individuals not otherwise authorized to peform such acts.

However, the chapter of the Health and Safety Code relating to blood banks does not limit or control the chapters in the Business and Professions Code on medicine, which authorize certain licensees in the healing arts to practice medicine, either generally or to a limited extent, and entirely prohibits the practice of medicine by other such licensees. Reconciliation of the subsequent additions and amendment of sections 1242.6 and 2860.5 is compelled by the express provisions of section 1200 which provide that "every provision of this chapter shall be liberally construed to protect the interests of all persons affected," and the provisions of section 1240 which provide:

> "This chapter does not authorize any person to practice medicine and surgery or to furnish the services of physicians for the practice of medicine and surgery. This chapter does not repeal or in any manner affect any provision of this code relating to the practice of medicine. This chapter does not prohibit the performance of tests not covered in Section 1206." See also 16 Ops. Cal. Atty. Gen. 188, 189 (1950).

Therefore, to the extent that the Legislature through the enactment of subsequent statutes such as sections 1242.6 and 2860.5 has extended to vocational nurses the authority to perform skin puncture and venipuncture for the purpose of withdrawing blood, said enactments will be deemed to be controlling. To do otherwise would result in a situation where individuals not otherwise authorized to perform skin puncture and venipuncture would be authorized pursuant to Health and Safety Code section 1607 to do so in a licensed blood bank, while other licensees in the healing arts, such as vocational nurses who are specifically authorized to perform skin puncture and venipuncture by their licensing laws, would be prohibited from doing so in a licensed blood bank. Such an interpretation would be clearly contrary to the intent of the Legislature, and therefore is to be avoided.

It is therefore concluded that vocational nurses working in licensed blood banks may perform skin puncture and venipuncture for the purpose of collecting whole blood upon authorization from any licensed physician and surgeon or any licensed dentist provided that prior thereto such vocational nurses have been instructed by a physician and surgeon and have demonstrated competence to such physician and surgeon in the proper procedure to be employed when withdrawing blood, or have satisfactorily completed a prescribed course of instruction approved by the Board, or have demonstrated competence to the satisfaction of said Board.
